86 1673

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHRISTOPHER GREGORY,
Petitioner,

v.

THOMAS J. DRURY, *et al.*,
Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April 16, 1987

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86-2081

CHRISTOPHER GREGORY,
Plaintiff-Appellant,

versus

THOMAS J. DRURY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(January 27, 1987)

Before CLARK, Chief Judge, WISDOM and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

We review the dismissal under Rule 12, Fed. R. Civ. P. of a suit by a former Trappist Monk, Christopher Gregory, also known as Brother Leo. The suit named as defendants the Attorney General of the State of Texas, the Alice National Bank and then members of the John G. and Marie Stella Kenedy Memorial Founda-

tion, including, among others, the Bishop of the Diocese of Corpus Christi. The complaint alleged that defendants conspired to deprive Brother Leo of a fair trial in a civil suit contesting control of a Texas foundation, depriving him of rights guaranteed by the fifth and fourteenth amendments to the United States Constitution and secured by a private right of action under Title 42 U.S.C. 1983, as well as his right to a trial by jury under state law.

The full story of this Texas-size will contest would challenge the imagination of even Larry McMurtry and has a cast that rivals his epic Lonesome Dove. But we enter at the very end of this legal saga, the end despite the entry of fresh counsel with ingenious arguments who try to salvage too much, too late, and with too little. We will tell only a small part of the story because as we see the case before us, the controlling issues need little factual flesh to be understood and decided. As we will explain, we are persuaded that the complaint stated no claim, and on that basis we affirm the district court's dismissal of the suit.

I

Mrs. Sarita Kenedy East was a resident of Sarita, located in Kenedy County, Texas. On January 22, 1960, at the age of 71, she created the John G. and Marie Stella Kenedy Memorial Foundation, a charitable organization under the Texas Non-Profit Corporation Act. She simultaneously executed a will naming the Foundation as the residuary devisee and legatee, provisions that would pass assets then worth in excess of twenty million dollars, assets now valued in excess of three hundred million dollars. Under Texas law and the by-laws of the Foundation, control of the Foundation rested with its members, who had full power to appoint the Foundation's directors. Mrs. East initially named herself as the sole member, but in February she added as members,

Lee H. Lytton, Jr., a relative, and Jacob Floyd, one of her attorneys. Lytton and Floyd were members only until June 30, 1960 when, at the request of Mrs. East, they resigned. She remained as the sole member of the Foundation until the end of the year when, by a codicil executed from her hospital bed in New York, she appointed Brother Leo as an additional member. Mrs. East died on February 11, 1961, leaving Brother Leo in control of the Foundation. Her will was admitted to probate by the County Court of Kenedy County on March 6, 1961. The will was soon contested by some thirty-nine persons, hopeful seekers that later grew to over one hundred persons, claiming to be heirs at law and seeking to set aside the will on the grounds of fraud, undue influence and lack of testimentary capacity. Of course, the Foundation's future turned on the validity of Mrs. East's 1960 will.

Meanwhile Lytton, represented by Floyd, sued in the 79th Judicial District Court of Jim Wells County, Texas alleging that Brother Leo had exercised undue influence over Mrs. East in persuading her to change the membership of the Foundation. Brother Leo then retained William R. Joyce, a lawyer from Washington D.C.

It is from these facts that the conspiracy to deprive Brother Leo of his constitutional rights, alleged in the suit before us, is said to have been born. According to Brother Leo, the practical difficulties of simultaneously defending the will from charges of undue influence, fraud and lack of capacity, while prosecuting similar charges leveled against Mrs. East's appointment of members of the Foundation during the same time period, fueled the efforts to settle the contest over Mrs. East's changes in the membership of the Foundation.

A tentative settlement of the suit over membership was reached among all parties except Brother Leo. He alleges that he initially refused to settle, but finally

agreed in September 1963 after he was assigned to a remote monastary in Chile and then on threat of excommunication; that in any event his agreement was conditioned upon approval of the Holy See. While it is undisputed that Brother Leo signed a settlement agreement and agreed judgment to be filed in the 79th District Court, Brother Leo asserts that before it was filed he had revoked his consent to entry of the consent judgment, and in a meeting in Miami, Florida in January 1964 he had expressly forbade Robert Jewett of the law firm of Baker and Botts from representing him; that for his obstinance he was sent to a monastary in Northern Canada and forbidden to discuss the case. He asserts that his Abbot, Dom Thomas Keating, on August 31, 1964, "falsely" sent a telegram to Jewett purporting to consent to the entry of the judgment on behalf of Brother Leo "as the superior of Christopher Gregory . . . in virtue of an understanding which I have with him." The agreed judgment was presented to the trial court and filed on September 1, 1964, without notice to Joyce, Brother Leo's Washington D.C. counsel, and while he was incommunicado in the Canadian monastary. He asserts that he learned of the judgment entered in Jim Wells County only through an article in the New York Times.

In March 1966 Gregory filed a separate suit, termed a bill of review, seeking review of the interlocutory judgment of September 1, 1964. The judgment had been made interlocutory pending the outcome of the will contests. *See, e.g., Turcotte v. Trevino,* 499 S.W.2d 705 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.). In *Gregory v. Lytton,* 422 S.W.2d 586 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.) the Texas Court of Civil Appeals affirmed the state district court's dismissal of the suit, on the basis that a bill of review did not lie to attack an interlocutory judgment.

On August 1, 1968, Brother Leo filed in the original suit in the District Court of Jim Wells County, the suit

attacking Mrs. East's changes in Foundation membership, a motion to set aside the interlocutory judgment entered by that court on September 1, 1964. In his motion to set aside, Brother Leo alleged, *inter alia*, that his consent to the settlement agreement and agreed judgment were obtained by duress and without his effective consent. Here the matter rested for some eleven years.

On July 24, 1979, and after all the contests of the 1960 will had been concluded, the Attorney General of Texas filed a Motion for Entry of Final Judgment and to Dismiss Gregory's Motion to Set Aside Interlocutory Judgment. With a hearing on this motion scheduled for September 21, 1979, Brother Leo filed on September 13, 1979, an amended motion to set aside the agreed judgment. The amended motion for the first time requested trial by jury. The Alice National Bank, as independent executor of the East estate, Kenneth Oden, counsel to the bank, the Kenedy Memorial Foundation, Thomas J. Drury, Bishop of the Diocese of Corpus Christi, Lytton and the president of the bank intervened in the suit and answered Gregory's motion, denying all its allegations.

Brother Leo did not question this joinder of issues and all parties appeared at the hearing on September 21, 1979, including Brother Leo. Brother Leo testified at the hearing that while he had personally signed the agreed interlocutory judgment, he did not consent as of September 21, 1979, to the entry of the final judgment. Although he requested a jury, Gregory's counsel argued that he was only prepared for a hearing; that he had no notice that there would be a full trial of the issues. Regardless, he requested no continuance and did not press his jury demand. Brother Leo's Texas counsel argued that he was entitled to a "full" trial of the consent issue but that in any event, under Texas law the interlocutory judgment could not be made final absent his consent when final judgment was entered, a consent that was indisputably absent. The trial court rejected his argu-

ment and entered final judgment from which Brother Leo appealed.

In his appeal Brother Leo argued to the San Antonio Court of Civil Appeals that his consent when the judgment was made final was required, that he had been denied due process of law and his right to jury trial under both the Texas and United States Constitutions. That court affirmed. *Gregory v. White,* 604 S.W.2d 402 (Tex. Civ. App.—San Antonio 1980, writ ref'd. n.r.e.), *cert. denied,* 452 U.S. 939 (1981). The panel was unanimous that the evidence conclusively demonstrated that Gregory had executed the settlement agreement and "neither the appellant's attorneys, the attorneys for the appellee, the trial judge, nor any of the other parties to the suit, knew of the conditional nature of his consent until several months after the judgment was rendered." *Id.* at 404. In sum, the court rejected the contention that Brother Leo's attorneys' lacked authority to represent him when the interlocutory judgment was filed and that, it held, was the critical time under Texas law.

In his application for writ of error to the Texas Supreme Court, Brother Leo urged that the Court of Civil Appeals had erred in five respects. First, it erred in affirming the trial courts' entry of final judgment without conducting a trial on the merits. Second, it erred in not requiring a full trial when the trial judge knew that a lack of consent was being asserted. Third, it erred in holding that under Texas law the jury demand was untimely. Fourth, it erred in rejecting his argument that entry of the final judgment denied him due process of law. Fifth, it erred in holding that a consent to entry of an interlocutory judgment was to be treated under Texas law as a consent to entry of a final judgment. The Texas Supreme Court refused the writ application with its notation of n.r.e.

In his Petition or Writ of Certiorari, Brother Leo, represented by his present counsel, urged that "The ac-

tions of the Courts below violated the due process clause of the Fourteenth Amendment to the United States Constitution," that he was denied due process and his right under state law to trial by jury. After denial of certiorari, Brother Leo filed this suit under 42 U.S.C. 1983.

II

Brother Leo alleged in his federal suit that he was "deprived . . . of his rights to trial and trial by jury in violation of Due Process under the Fifth and Fourteenth Amendments to the United States Constitution." He argues that he never had a trial on the issues of his undue influence of Mrs. East, that he lacked adequate notice of the hearing of September 1, 1964, particularly given that once the interlocutory judgment was entered he was barred from attacking it, "either by way of appeal or when it was converted into a final judgment."

Defendants urged dismissal contending that no claim for constitutional wrong had been stated; that any claim was barred by laches and limitations and precluded by principles of res judicata and collateral estoppel.

We are persuaded that Brother Leo's effort to state a claim that Texas has deprived him of his rights to a hearing and to a trial by jury must fail.[1] The undis-

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[1] All parties here and below have referred to matters extrinsic to the complaint. They were also considered by the district court in its grant of a motion to dismiss. Ordinarily, the defense of *res judicata* cannot be determined on a motion to dismiss for failure to state a claim. Here, the state court decisions were virtually apparent on the face of the complaint. In any event, all parties have treated the skeleton facts outlining the history of the state court decisions as a statement of the set of facts that Brother Leo might adduce under the complaint.

We could, with equal confidence, treat the ruling below as a grant of summary judgment. All parties had a full opportunity to present their arguments below and there is no issue over the facts essential to our opinion. In this circumstance, we see no reason to

puted facts are that Texas heard his contention that his consent to entry of judgment was not effective and rejected it. A trial judge in Jim Wells County heard evidence, including the testimony of Brother Leo, and concluded that under Texas law his agreement was binding. His claims that the hearing on his motion to set aside the interlocutory judgment was inadequate under state law and the United States Constitution were thereafter heard and rejected by two levels of Texas Courts. At each stage he was represented by counsel.

Whatever the label placed on the proceeding in which Brother Leo's motion to set aside the interlocutory judgment was decided, and regardless of our view of its constitutional sufficiency, if we are bound by the state court decisions that he received a full opportunity to present his factual and legal theories—both that his earlier consent was ineffiective and that his present consent was necessary—we must affirm the district court's dismissal. We turn to that issue.

III

We must give to the state court rulings that the hearings given Brother Leo on his attack upon the interlocutory judgment were adequate under the United States Constitution and state law, the preclusive effect that Texas courts would give to them. *See* U.S. Const. art. IV, § 1; 28 U.S.C. § 1738.

Allen v. McCurry, 449 U.S. 90 (1980), held that federal courts must look to state rules of issue preclusion for issues actually litigated, but left open the possibility that federal issues that might have been litigated, but were not, would be treated differently under 42 U.S.C. § 1983. The court closed that door in *Migra v. Warren City School District Board of Education*, 104 S.Ct. 892 (1984), noting that "the policy concerns underlying

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linger over the distinction, and we simply affirm the judgment for defendants entered by the district court.

§ 1983 would [not] justify a distinction between the issue preclusive and the claim preclusive effect of state-court judgments." *Id.* at 897.

We have recently reviewed the Texas law of res judicata.[2] In *Flores v. Edinburg Consolidated Independent School District*, 741 F.2d 773 (5th Cir. 1984), we explained that issues actually litigated are barred in subsequent suits between the parties even though a different cause of action is asserted; that when the subsequent suits asserts the same cause of action, issues that might have been litigated are precluded as well. We rejected the suggestion that a suit under 42 U.S.C. § 1983 was necessarily a different cause of action from a state cause of action for tort drawn from the same facts explaining:

> that "a different cause of action" is one that proceeds not only on a sufficiently different legal theory but also on a different factual footing as not to require the trial of facts material to the former suit; that is, an action that can be maintained even if all the disputed issues raised in the plaintiff's original complaint are conceded in the defendant's favor.

Id. at 777.

We are persuaded that measured by Texas rules of preclusion every attack now leveled in federal court against the September 21, 1979, hearing in Jim Wells County was presented to the Texas courts, and rejected. Should we add, and we need not, that Brother Leo is

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[2] In our recent opinion in *McWilliams v. McWilliams*, 804 F.2d 1400, 1403 (5th Cir. 1986), Judge Wisdom described the competing interests in the decision to accept state law rules of both issue and claim preclusion in cases prosecuted under the Civil War Amendments concluding that "the difference between an inferior court and the United States Supreme Court effectively eliminates options in our decision-making function. We must honor the claim-preclusive effect of the state court's judgment, regardless of Section 1983."

also bound by what he might have argued in the Texas courts, his argument loses the little force it has. This is so because Brother Leo surely asserts in federal court the same cause of action he asserted in state court. He must be able to maintain his federal suit with "all the disputed issues raised in [his motion to set aside] . . . conceded in . . . defendant[s'] favor." *Id.* This he cannot do.

New and able counsel attempt to extricate Brother Leo from the reality that he has tried his constitutional and state law claims in state court, and lost. The escape argument, as we understand it, is that he does not seek a second trial of the state determined issues. Rather, it is the sum of all the rulings that is the alleged state deprivation of constitutional rights. He argues that changes in state law, with which he does not here quarrel, had the effect in *his* case of foreclosing a fair hearing; that he was placed in a legal Catch 22.

The argument is that by first rejecting his bill of review on the basis that the bill would not lie to attack an interlocutory judgment, and latter holding that his consent to the entry of the interlocutory judgment could not be defeated by objecting after its entry, Texas courts effectively held that "Gregory's first challenge was too early; his second challenge too late."

We find no such dilemma. That a bill of review attacking the interlocutory judgment was not allowed did not foreclose his motion to set aside the judgment filed in that case—as demonstrated by the fact that it was heard. Issue over the effectiveness of Brother Leo's consent to entry of the interlocutory judgment was joined on his motion to set aside. He then tried in the Texas courts the issue of the adequacy of that hearing under state law and the United States Constitution. Under § 1738 and the full faith and credit clause, whether or not he is now asserting the same cause of action, we must accept the state courts' decisions.

We do not here face the issue of the preclusive effect under state law of a state court judgment flawed by a systemic failure of constitutional dimensions. Nothing suggests that the appellate review of the rejection of Brother Leo's motion to set aside was constitutionally suspect, whether or not one agrees with the rulings. In this critical sense, there is no question but that Brother Leo's perceived Catch 22 did not exist.

Of course, the right to a jury including the timeliness of the jury denial were state law issues decided against Brother Leo and present no constitutional issue were we free to reconsider the state rulings, and as we have explained, we are not.

In sum, Brother Leo's federal court suit is ultimately an attack on the hearing held in Jim Wells County on September 21, 1979. It is a fight that he elected to make in the Texas courts with a right of review by writ of certiorari from the Supreme Court of the United States to the Texas Supreme Court. We are not free to decide the issues a second time.

We have rejected Brother Leo's arguments, but we are not persuaded that his appeal was frivolous. Defendants' request for double costs and counsel fees is rejected.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action C-82-84

CHRISTOPHER GREGORY

v.

THOMAS J. DRURY, *et al.*

[Filed Jan. 27, 1986]

FINAL JUDGMENT

In accordance with the Order filed on January 24, 1986, it is ORDERED that judgment be entered.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, this 24th day of January, 1986.

/s/ Carl O. Bue, Jr.
CARL O. BUE, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action C-82-84

CHRISTOPHER GREGORY

vs.

THOMAS J. DRURY, BRUNO R. GOLDAPP, ELENA S. KENEDY, LEE H. LYTTON, JR., KENNETH ODEN, MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND ALICE NATIONAL BANK

[Filed Jan. 27, 1986]

ORDER

On the 9th day of January, 1986, pursuant to notice to all parties of the consideration of all pending motions by the Court, there came on to be heard Defendants' Motion for Judgment on the Pleadings and Dismissal, and the Plaintiff appearing by his counsel of record and all Defendants' [sic] appearing by their respective counsel of record, and the Court having examined all the pleadings herein and the affidavits submitted in support and opposition thereof, and the Court having reviewed the Briefs of the respecitve parties, and having heard the arguments of Counsel, and being otherwise fully advised in the premises, the Court finds that the Plaintiff is not entitled to the relief which he claims and that the Defendants' [sic] are entitled to a Judgment in their favor and a Dismissal of Plaintiff's Suit;

IT IS HEREBY ORDERED, that Defendants' Motion for Judgment on the Pleadings is SUSTAINED, and this cause is DISMISSED with prejudice at Plaintiff's cost. The Court having considered all other motions and matters pending herein, all other relief which has not been expressly granted herein, or which is inconsistent with the Dismissal of this cause, is expressly DENIED.

DATED the 24th day of January, 1986.

/s/ Carl O. Bue, Jr.
CARL O. BUE, Jr.
District Judge Presiding

APPENDIX C

COURT OF CIVIL APPEALS OF TEXAS
SAN ANTONIO

No. 16482

CHRISTOPHER GREGORY,
Appellant,

v.

MARK WHITE, ATTORNEY GENERAL
OF THE STATE OF TEXAS, *et al.*,
Appellees.

July 25, 1980

OPINION

MURRAY, *Justice.*

This is an appeal by Christopher Gregory, also known as Brother Leo, from a judgment entered by the 79th Judicial District Court of Jim Wells County, Texas. The judgment in this cause determined who was entitled to serve as members and directors of The John G. and Marie Stella Kenedy Memorial Foundation, which was established by Sarita K. East prior to her death on February 11, 1961. This appeal represents the latest installment in the East will litigation, which began in the early 1960's.[1] The present suit was instituted in 1961 and was settled by agreement in 1963. The settle-

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[1] As pointed out by the supreme court in *Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978), there have been numerous appeals involving the East estate. *See id.* at 684 n.1.

ment agreement, reduced to writing and signed by all of the parties, was incorporated in a judgment on September 1, 1964. The judgment was expressly made interlocutory pending the outcome of two suits in which claims against the East estate were being adjudicated. Approximately eighteen months after the interlocutory judgment was rendered the appellant filed a petition in the nature of a bill of review to set it aside. The trial court dismissed the petition reasoning that the order was not a final judgment and was therefore not properly the subject of a suit in the nature of a bill of review. On appeal this court affirmed the trial court's action dismissing the appellant's petition. *See Gregory v. Lytton*, 422 S.W.2d 586, 591 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.)[2]

On July 24, 1979, the appellees filed a motion for the entry of final judgment arguing that the supreme court's decision in *Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978), removed the last obstacle to making the September 1, 1964, judgment final. Subsequently, on September 14, 1979, the appellant filed a first amended motion to set aside the interlocutory judgment contending that the settlement agreement upon which the judgment was based is void for the following reasons: lack of authority, duress, failure of condition precedent, and because he no longer consented to the agreement.[3]

After a hearing the trial court granted the appellees' motion for the entry of final judgment. It is from this judgment that the appellant has perfected an appeal.

By several points of error the appellant contends that the trial court erred in entering a final judgment because

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[2] The background of this case is fully set out in *Gregory v. Lytton*, and will not be repeated here. We will, of course, provide additional facts necessary for an understanding of the disposition of this appeal.

[3] Appellant's original motion to set aside the interlocutory judgment was filed on August 1, 1968.

(1) he notified the court prior to the entry of final judgment that he had withdrawn his consent to the settlement agreement; and (2) his consent to the settlement agreement was conditional and the condition has not been met.

[1, 2] A valid consent judgment cannot be rendered if, at the time the court undertakes to make the agreement the judgment of the court, the trial judge has knowledge that one of the parties to the suit has withdrawn his consent. Moreover, an agreed judgment should not be entered if the trial judge possesses information that would reasonably prompt further inquiry, and this inquiry, if pursued, would disclose a lack of consent. *See Burnaman v. Heaton*, 150 Tex. 333, 339, 240 S.W.2d 288, 291-92 (1951).

[3] Once a settlement contract, agreed to by all of the parties to the suit, is incorporated in a judgment of the court, however, a party is precluded from attacking the validity of the judgment in the absence of an allegation and proof of fraud or collusion. This rule is simply an application of the general principle that one cannot complain of that to which he has agreed. *See De Lee v. Allied Finance Co.*, 408 S.W.2d 245, 247 (Tex. Civ. App. —Dallas 1966, no writ). In the instant case the evidence conclusively establishes that the appellant signed the settlement agreement and that the judge had no reason to know of any dissatisfaction that the appellant might have had with the agreement at the time the interlocutory judgment was rendered.

[4] There is no justification either in law or logic for applying a different rule to agreed interlocutory judgments than to agreed final judgments. An agreed interlocutory judgment would be of little value if its terms could be avoided by the withdrawal of consent of one of the parties. Accordingly, we hold that the above-stated principles governing agreed judgments apply to all consent judgments whether interlocutory or final.

[5] In support of his assertion that he never consented unconditionally to the settlement agreement the appellant relies on his own testimony adduced at the hearing on the appellees' motion for entry of final judgment. In this regard he testified that he was told by his superior that if he did not sign the agreement he would be excommunicated from the Catholic Church. He subsequently consulted another superior who suggested that he sign the document and attach to it a cover letter to the Holy See in Rome, which would require the Holy See's written approval before the settlement agreement was released to the court.

The appellant argues that his lawyers were not authorized to effect the settlement agreement since he had conditioned his consent on the approval of the Holy See and the condition has not been met. We disagree.

In April of 1961 the Houston, Texas, law firm of Baker & Botts was retained to represent the appellant and others, including The John G. and Marie Stella Kenedy Memorial Foundation. Thereafter, in 1963 a settlement agreement was entered into by the parties. The appellant signed this agreement both in his individual and religious capacities. Although the interlocutory judgment incorporating this agreement was not rendered for more than a year after the settlement agreement was executed, neither the appellant's attorneys, the attorneys for the appellee, the trial judge, nor any of the other parties to the suit, knew of the conditional nature of his consent until several months after the judgment was rendered.

The appellant's attorneys negotiated a settlement in his behalf and were in possession of a settlement agreement and proposed judgment, which, on their face, were unconditionally executed and assented to by the appellant. We hold that Baker & Botts was authorized to seek a judgment entered in accordance with the settlement agreement, and that the appellant's failure to communi-

cate to his attorneys, the appellees' attorneys, the trial judge, or any of the other parties, the conditional nature of his consent before the judgment was rendered, precludes him from denying this authority. *See Allsman v. Robinson*, 25 S.W.2d 237, 239 (Tex. Civ. App.—El Paso 1930, no writ).

For the reasons stated above we overrule the appellant's points of error and affirm the judgment of the trial court.

CADENA, *Chief Justice, dissenting.*

There can be no quarrel with the holding by the majority that a consent interlocutory judgment cannot be set aside if it was entered prior to the time that the consent of one of the parties was revoked. But appellant in this case complains of the fact that the trial court entered a final judgment without a hearing on the merits after he had made known to the court that he had withdrawn his consent to the agreement on which the agreed interlocutory judgment was based.

The authorities cited in the majority opinion hold that a valid consent judgment cannot be rendered if, at the time the court undertakes to make the agreement of the parties the judgment of the court the trial judge has knowledge that one of the parties to the agreement has withdrawn his consent or if, prior to rendition of the judgment, the trial court has knowledge of facts which would reasonably prompt further inquiry and such inquiry would disclose the lack of continued consent. It is clear in this case that, at the time the final judgment was rendered, the trial court was fully aware of the fact that appellant had revoked his consent. While it is true that at the time the interlocutory order was rendered the trial court had no reason to suspect that appellant was dissatisfied with the agreement, this fact can justify

no more than a holding that the interlocutory order was properly rendered.

Since appellant did not consent to the rendition of the final judgment, basing such judgment on the repudiated agreement was clearly error. *Burnaman v. Heaton*, 150 Tex. 333, 240 S.W.2d 288 (1951).

APPENDIX D

Entered November 28, 1979

IN THE DISTRICT COURT OF
JIM WELLS COUNTY, TEXAS
79th JUDICIAL DISTRICT

No. 12,074

LEE H. LYTTON, JR.

v.

THE JOHN G. AND MARIE STELLA
KENEDY FOUNDATION, *et al.*

FINAL JUDGMENT

BE IT REMEMBERED that on the 21st day of September, 1979 there came on to be heard the motion of the Honorable Mark White, Attorney General of the State of Texas, and others, for entry of final judgment and for dismissal of defendant Christopher Gregory's motion to set aside the interlocutory judgment previously entered herein on September 1, 1964, and the Court having heard all witnesses called by any party, and having read their written submissions and having fully considered the matter, it is the opinion of the Court that said motion should be granted; and

The temporary injunction referred to in Article VII of this Court's September 1, 1964 judgment as having theretofore issued out of the District Court of Kenedy County, Texas, 105th Judicial District, in Cause No. 85 styled *Arnold R. Garcia, Temporary Administrator of the Estate of Sarita K. East, Deceased,* against *The John G. and Marie Stella Kenedy Memorial Foundation, et al.,*

having been dissolved and avoided with the dismissal with prejudice of that action on September 25, 1978, and all contests to the probate of the Will of Sarita K. East having been finally resolved and all other conditions to the entry of final judgment recited in *Gregory v. Lytton*, No. 14633 in the Court of Civil Appeals, San Antonio Division, having been fulfilled,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The motion for entry of final judgment and for dismissal of defendant Christopher Gregory's motion to set aside the interlocutory judgment previously entered herein on September 1, 1964, is granted in all respects.

2. The interlocutory injunctive provisions of Article V of the September 1, 1964 judgment are hereby vacated and dissolved and the said judgment is in all other respects reaffirmed and made final.

3. The John G. and Marie Stella Kenedy Memorial Foundation, the Alice National Bank of Alice, Texas, and the Estate of Sarita Kennedy East are hereby authorized and directed to take all steps necessary to execute, acknowledge, and deliver the instrument of assignment, in the form attached as Exhibit C to this Court's Judgment of September 1, 1964, as modified to take account of intervening events as shown by Exhibit A attached hereto, to the Sarita Kennedy East Foundation ("SKEF"), together with all royalty payments which have accrued thereon to SKEF and a proper accounting therefor.

4. This final judgment is without prejudice to the position of the respective parties concerning certain outstanding differences between them as to interest on such royalty payments and other matters concerning the proper interpretation of their settlement agreement.

5. All costs shall be taxed against the party incurring such costs for which execution shall issue if not timely paid.

RENDERED and SIGNED this 28th day of November, 1979.

s/ C.W. Laughlin
C.W. LAUGHLIN
District Judge

THE STATE OF TEXAS)
COUNTY OF JIM HOGG)

KNOW ALL MEN BY THESE PRESENTS: that The John G. and Marie Stella Kenedy Memorial Foundation ("Grantor" herein), a non-profit corporation organized and existing under the laws of the State of Texas, joined herein by Alice National Bank, a national banking association with its place of business in Alice, Texas, acting herein only in its capacity as executor of the Estate of Sarita K. East, deceased, for and in consideration of Ten Dollars ($10.00) cash and other good and valuable considerations in hand paid by the Sarita Kenedy East Foundation Inc., a non-profit corporation organized and existing under the laws of the State of New York ("Grantee" herein), the receipt and sufficiency of which are hereby acknowledged, have GRANTED, SOLD, CONVEYED and ASSIGNED, and do hereby GRANT, SELL, CONVEY and ASSIGN unto Grantee an undivided seven-eighths (7/8ths) interest in all oil, gas and other minerals owned by Sarita K. East at the time of her death according to the records of Jim Hogg County, Texas (said oil, gas and mineral interests of Sarita K. East having been acquired under her will and being now owned by Grantor), in, under and that may be produced and saved from the following described lands situated in Jim Hogg County, Texas, to-wit:

> 43,263.46 acres of land, more or less, known as the San Pablo Ranch and fully described in a royalty deed from Sarita K. East to Reverend K.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese,

dated September 1, 1947, of record in Vol. 28, Pages 319-21 of the Jim Hogg County Deed Records,

and, in addition, an undivided seven-eighths (7/8ths) of all royalty interests owned by Grantor according to said records in all oil, gas and other materials produced and saved from the above described lands.

This sale and conveyance is expressly made, and is expressly accepted by Grantee, subject to all oil, gas and mineral leases now effective in respect of said lands, and any of them, but covers and includes seven-eighths (7/8ths) of all royalties payable under any and all of such oil, gas and mineral leases now in effect or hereafter executed in respect of said lands; provided, however, that this sale and conveyance, in so far as it relates to an undivided seven-eighths (7/8ths) interest in said oil, gas and mineral interests owned by Sarita K. East at the time of her death, is further expressly made, and is further expressly accepted by Grantee, subject to (but said undivided seven-eighths (7/8ths) interest shall bear only its proportionate seven-eighths (7/8ths) part of) (i) all royalty interests assigned or conveyed of record in Jim Hogg County, Texas, by Sarita K. East prior to her death (but only to the extent such royalty interests shall be subsisting at any time in question) out of any portions of the lands hereinabove described in favor of any persons, including specifically but not limited to the royalty interests assigned or conveyed by the following instruments:

GRANTEE	DATE OF INSTRUMENT	Recorded in Deed or Lease * Records of Jim Hogg County at VOLUME	PAGE
E.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese	September 1, 1947	28	519 et seq.
Stella Lytton	September 1, 1947	28	532 et seq.
Stella Lytton	September 1, 1947	28	530 et seq.
Stella Lytton	February 28, 1955	39*	103 et seq.
Stella Lytton	June 22, 1956	41*	267 et seq.
Stella Lytton	May 22, 1957	38*	519 et seq.
L.E. Turcotte	September 1, 1947	28	534 et seq.
L.E. Turcotte	September 1, 1947	28	536 et seq.
L.E. Turcotte	February 28, 1955	39*	101 et seq.
L.E. Turcotte	June 22, 1956	41*	269 et seq.
L.E. Turcotte	May 22, 1957	38*	522 et seq.
Irene Putegnat	October 19, 1947	28	525 et seq.
Irene Putegnat	September 1, 1957	28	527 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	91 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	93 et seq.

and (ii) those two certain annual lifetime annuities of Twenty-Five Thousand Dollars ($25,000.00) payable in equal monthly installments to each, respectively, of Stella Turcotte Lytton and Louis Edgar Turcotte out of the first royalties accruing monthly to Grantor and to Grantee from production under any presently existing or future oil and gas leases upon the above described lands as provided under Article III of the Will of Sarita K. East, deceased, as amended under Second of the Fourth Codicil to said Will. Delivery of payment of all royalty deliverable or payable to Grantee shall be made in the same manner as is provided for the delivery of payment of royalties to Grantor under any present or future mineral lease affecting said lands.

Grantor, for itself and its successors and assigns, hereby reserves and hereby excepts from the interest conveyed to Grantee hereunder, subject to the further provisions hereof, all rights in respect of the development of said hereinabove described lands for the production of oil, gas and other minerals, and all rights in respect of any subsequent leasing of said hereinabove described lands or any portion thereof, without the necessity of any joinder by Grantee, for the development of oil, gas or other minerals, and all rights to receive the entirety of any amounts which may be receivable under such lease either as bonus monies or delay rentals. It is hereby further expressly agreed and understood between Grantor and Grantee that Grantor, its successors and assigns, shall not make any oil, gas or mineral lease in respect of any of the above described lands which provides (i) for a royalty of less than one-eighth (1/8th) of all oil produced, saved and sold, of less than one-eighth (1/8th) of the value of all gas produced, saved and sold, or used for commercial purposes and of less than one-eighth (1/8th) of the value of any other minerals produced from said premises and sold or used for commercial purposes, (ii) for a bonus, whether present or deferred, in excess

of $10,000 or $2 per acre for the lands leased, whichever shall be the lesser amount, (iii) for delay rentals in excess of $2 per acre per year, or (iv) for pooling for any purposes of any lands subject to any such lease with any other lands except that Grantee through its acceptance hereof agrees that it will not unreasonably refuse to enter into any such pooling agreements in regard to the herein described lands as may be approved for execution by Grantor, its successors and assigns. In the event oil, gas or other minerals are produced from the above described lands, or any part thereof, by Grantor, its successors and assigns, other than under a lease or leases, Grantee shall be entitled to receive a free royalty upon such production equivalent to the fraction or portion herein conveyed to Grantee of the minimum royalties above stated, i.e. seven-eighths (7/8ths) of one-eighth (1/8th).

The interest herein sold and conveyed to Grantee shall cease, terminate and revert to Grantor, its successors and assigns, when Grantee shall have received from the gross proceeds of production attributable to such interest (it being expressly understood and agreed in this connection that production attributable to such interest shall not include production attributable to the aforementioned existing royalty or annuity interests to which the interest herein conveyed may now be subject, nor shall it include production attributable under any circumstances to the interest retained by Grantor hereunder or to the interest of any lessee) an aggregate sum of Fourteen Million Four Hundred Thousand Dollars ($14,400,000.00); provided, however, if any of the proceeds of the interest herein conveyed to Grantee shall be withheld for any reason involving the title to the interest herein conveyed to Grantee then Grantee shall not be deemed to have received or realized any such proceeds from the interest until, and only to the extent that, the proceeds from the sale thereof have actually been received by Grantee, or if, at any time

whatsoever either before or after the receipt of the full aggregate sum of such amount, Grantee shall be compelled, for any reason involving the title to the interest herein conveyed to Grantee, to make any payment or restitution on account of proceeds theretofore received by Grantee, then, at the time any such payment or restitution is made, the said aggregate sum shall from the date of such payment or restitution be increased by an amount equal to such payment or restitution; and provided, further, that following the receipt by Grantee of such aggregate sum (as the same may be increased on account of any payment or restitution by Grantee of any of the proceeds of such mineral interest), the reversionary interest in any such amounts withheld from, or as to which payment or restitution from Grantee may be required, shall accrue to Grantor, its successors and assigns. No loss or failure of title shall have the effect of reducing the aforesaid sum of Fourteen Million Four Hundred Thousand Dollars ($14,400,000.00).

Grantee, its successors and assigns, shall be responsible for and agrees to hold Grantor harmless from the payment of ad valorem, gross production, severance, gift, inheritance and any and all other taxes of whatsover kind or character now existing or hereafter levied which may in any manner be attributable to the interest herein sold and conveyed to Grantee.

It is expressly understood and agreed by and between Grantor and Grantee herein that this transfer and conveyance is made pursuant to the terms of the Judgment of the District Court of Jim Wells County, Texas, in Cause No. 12,074, styled Lee H. Lytton, Jr., et al vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, dated 1st day of September, 1964, and the Final Judgment in said Cause entered in November 1979, and that in the event the interest herein assigned and conveyed to Grantee fails to yield or pay or accrue to Grantee, the full sum of Fourteen Million Four Hundred

Thousand Dollars ($14,400,000.00), then and in that event, Grantee shall have no recourse upon Grantor or the executors of the Estate of Sarita K. East, deceased, for any further sums of money or interest whatsoever.

TO HAVE AND TO HOLD the above described mineral interest, together with all and singular the rights and appurtenances of every kind and character thereto in any wise belonging without limitation other than as herein expressly provided, unto Grantee, its successors and assigns, and Grantor does hereby bind itself and its successors to warrant and forever defend all and singular the said mineral interest herein sold and conveyed to Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof by, through or under Grantor.

Anything herein to the contrary notwithstanding, it is understood and agreed that in the event Grantee herein shall assign or transfer (not including any mortgage or similar encumbrance) the interest conveyed herein by Grantor to Grantee or any portion thereof, then and in such event the restrictions and limitations with respect to the amount of bonuses and delay rentals and provisions in regard to pooling set forth in clauses (ii), (iii) and (iv) on page 4 hereof shall not apply.

Grantor, for itself, its successors and assigns, hereby agrees that if all or any portion of said above described lands shall for any reason cease to be subject to the terms of any oil, gas and other minerals lease, whether as a result of the termination of any present or future oil, gas and other minerals lease, it will not unreasonably refuse to execute another oil, gas and mineral lease of the nature hereinabove contemplated on such unleased premises.

This instrument is subject to certain letter agreement dated February 20, 1964.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed by its officers, hereunto duly author-

ized, and to be affixed with its corporate seal, this the day of 1979, as of the 1st day of April, 1962.

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

By: _____
President

GRANTOR

ATTEST:

_____
Secretary

ALICE NATIONAL BANK

By: _____
President

ATTEST:

_____
Cashier

Executor of the Estate of
Sarita K. East, Deceased,
February 11, 1961

FILED

at 4:06 o'clock p.m.

NOV 28 1979

Manuel M. Perez
Clerk District Court
Jim Wells County, Tex.

BY _____ DEPUTY

APPENDIX E

Entered September 1, 1964

IN THE DISTRICT COURT OF
JIM WELLS COUNTY, TEXAS
79TH JUDICIAL DISTRICT

No. 12,074

LEE H. LYTTON, JR.

v.

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, *et al.*

JUDGMENT

BE IT REMEMBERED that on this 1st day of September, 1964, there came on to be heard the above entitled and numbered cause, wherein Lee H. Lytton, Jr. is plaintiff and cross-defendant, Jacob S. Floyd is defendant and cross-plaintiff, Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, is intervenor, and The John G. and Marie Stella Kenedy Memorial Foundation, T. M. Doyle, John J. Meehan, J. Peter Grace, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong, joined pro forma by her husband, Thomas M. Armstrong, Lawrence E. Wood and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., are defendants and cross-defendants, and wherein the Attorney General of the State of Texas is joined as a party, having been served with process and citation in accordance with the terms of Article 4412a, Section 3, Vernon's Civil Statutes of Texas, these being

all of the parties of record in this suit, and it appearing to the court that T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S.C., Henrietta K. Armstrong and Lawrence E. Wood have this day, in open court, resigned from, and renounced their rights to, their respective offices as members, directors and officers of The John G. and Marie Stella Kenedy Memorial Foundation, and that the plaintiff and cross-defendant, Lee H. Lytton, Jr., and the defendant and cross-plaintiff, Jacob S. Floyd, and the intervenor, Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, by and through their attorneys of record, announced in open court that they, the said plaintiffs and cross-defendant, Lee H. Lytton, Jr., and the defendant and cross-plaintiff, Jacob S. Floyd, and the intervenor, Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, no longer wished to prosecute this suit as against the said T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong joined pro forma by her husband, Thomas M. Armstrong, and Lawrence E. Wood and requested that the court dismiss this suit, with prejudice, as against said parties;

It is accordingly ORDERED, ADJUDGED and DECREED by the court that this suit be and the same is hereby dismissed, with prejudice, against the said T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong, joined pro forma by her husband, Thomas M. Armstrong, and Lawrence E. Wood.

And then came the remaining parties to this action, to-wit, plaintiff and cross-defendant Lee H. Lytton, Jr., defendant and cross-plaintiff Jacob S. Floyd, intervenor Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, defendants and cross-defendants The John G. and Marie Stella Kenedy Memorial Foundation, Christopher Gregory, sometimes known as Brother Leo O.C.S.O., J. Peter Grace and the Attorney General of the State of Texas, all by and through

their respective attorneys of record, and announced ready for trial; whereupon, a jury being waived by all parties, it was announced to the court that the parties hereto had agreed to compromise and settle all issues raised herein, as well as all issues made the basis of this suit, it being distinctly understood that in making this settlement no party makes any admission with regard to any of the allegations made in the pleadings on file in this suit; and it further appearing that Lee H. Lytton, Jr. and Jacob S. Floyd have this day, in open court, ratified their resignations, dated June 13, 1960, as members of The John G. and Marie Stella Kenedy Memorial Foundation, and that the sole and only members of said The John G. and Marie Stella Kenedy Memorial Foundation now remaining are J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O.; and it further appearing to the court that the said J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., thereupon, in open court, appointed, in compliance with the By-Laws of said The John G. and Marie Stella Kenedy Memorial Foundation, the following persons as members of such Foundation, to-wit:

Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, and/or his successors in office
Elena S. Kenedy
Lee H. Lytton, Jr.
Kenneth Oden
B.R. Goldapp

and it further appearing that the said J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., thereafter, in open court, resigned from their respective offices as members and/or directors of said The John G. and Marie Stella Kenedy Memorial Foundation in compliance with the By-Laws of such Foundation; and it further appearing to the court that the aforesaid members, to-wit, Most Reverend M. S. Garriga, Elena S. Kenedy, Lee H. Lytton, Jr., Kenneth

Oden and B.R. Goldapp, have, in open court, duly elected the following named persons as directors of said The John G. and Marie Stella Kenedy Memorial Foundation, pursuant to the By-Laws thereof, to-wit:

Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi
Elena S. Kenedy
Lee H. Lytton, Jr.
Kenneth Oden
B.R. Goldapp

and it further appearing to the court that the aforesaid directors, have in open court, duly elected the following officers of said The John G. and Marie Stella Kenedy Memorial Foundation, pursuant to the By-laws thereof, to-wit:

Elena S. Kenedy—*President*
Bishop M. S. Garriga—*Vice President*
Kenneth Oden—*Secretary-Treasurer*
Lee H. Lytton, Jr.—*Assistant Secretary-Treasurer*

and it appearing to the court that the members have, in open court, adopted amendments to the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation in the form of Exhibit A attached hereto and made a part hereof, and have, in open court, adopted amendments to the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation, which said amendments to the By-Laws are set forth in Exhibit B attached hereto and made a part hereof, and the court having examined said amendments to the Articles of Incorporation and By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation are found the same to be in proper order and to reflect correctly the agreement of the parties and that such amendments to the Articles of Incorporation and By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation should be approved and ratified by the court; and it appearing to the court, and the court having been fully advised in the premises, that the afore-

said compromise and settlement should be approved and that Judgment should be entered herein in accordance with such settlement agreed upon; and it further appearing to the court that the proper officers of the said Foundation, also in open court, in accordance with this compromise agreement and Judgment have executed the instrument, a copy of which is attached to this Judgment and made a part hereof and marked Exhibit C, and which instrument has been examined by the court and found to be in proper order and to reflect correctly the agreement of the parties and such instrument should be approved and ratified by the court; and it further appearing to the court that all parties to this action acting by and through their duly authorized attorneys of record, in open court, have approved this Judgment by affixing their signatures hereto; and it further appearing to the court that the Attorney General of Texas, in open court, by and through his designated Assistant Attorney General, has stated that the Attorney General's Office has reviewed the terms, conditions and provisions of this settlement and all exhibits attached hereto, and that the said terms, conditions and provisions have been found to be in the best interests of the public beneficiaries of Texas, and therefore the Attorney General of Texas does hereby ratify and grant to this settlement according to the provisions of Article 4412a, Vernon's Civil Statutes of Texas, and the court being of the opinion that upon the recommendation of the Attorney General of Texas this settlement be in all things approved;

It is accordingly ORDERED, ADJUDGED and DECREED by the court—

(1) That on the date of this Judgment, and pursuant to the appointment of members and election of directors and officers as aforesaid, the present and only duly and legally authorized and elected members, directors and officers of The John G. and Marie Stella Kenedy Memorial Foundation are as follows:

Members: Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, and/or his successors in office
Elena S. Kenedy
Lee H. Lytton, Jr.
Kenneth Oden
B.R. Goldapp

Directors: Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi
Elena S. Kenedy
Lee H. Lytton, Jr.
Kenneth Oden
B.R. Goldapp

Officers: Elena S. Kenedy—*President*
Bishop M.S. Garriga—*Vice President*
Kenneth Oden—*Secretary-Treasurer*
Lee H. Lytton, Jr.—*Assistant Secretary-Treasurer*

(2) That the meetings and acts of the members, directors and officers of The John G. and Marie Stella Kenedy Memorial Foundation, as reflected by the minutes thereof, held or done in open court this day, be and they are in all things confirmed, ratified and approved as the legal and binding acts of The John G. and Marie Stella Kenedy Memorial Foundation.

(3) That the instrument executed by the President of The John G. and Marie Stella Kenedy Memorial Foundation and attested by its Secretary be and it is hereby declared to be the legal act of The John G. and Marie Stella Kenedy Memorial Foundation, a copy of such instrument, marked Exhibit C, being attached to and all of its terms being made a part of this Judgment, as if fully incorporated herein.

(4) That this suit, as to all issues raised herein by any party herein, be and the same is hereby dismissed, with prejudice, as against the said J. Peter Grace and

Christopher Gregory, sometimes known as Brother Leo O.C.S.O. The John G. and Marie Stella Kenedy Memorial Foundation is hereby dismissed as a party defendant.

APPROVED AS TO FORM AND SUBSTANCE:

s/ LEE H. LYTTON, JR.
LEE H. LYTTON, JR.
Plaintiff

By s/ JACOB S. FLOYD
JACOB S. FLOYD
Defendant and Cross-Plaintiff

PERKINS, FLOYD, DAVIS & ODEN
P.O. Drawer 331
Alice, Texas

By s/ KENNETH ODEN
KENNETH ODEN
Attorneys for Plaintiff Lee H. Lytton, Jr.,
Defendant and Cross-Plaintiff Jacob S. Floyd and
Executors of the Estate of Sarita Kenedy East,
Deceased

By s/ M. S. GARRIGA
M.S. GARRIGA, Roman Catholic Bishop of the
Diocese of Corpus Christi
Intervenor

By s/ ELMORE BORCHERS
ELMORE BORCHERS
Laredo, Texas
and

s/ PATRICK J. HORKIN, JR.

PATRICK J. HORKIN, JR.
717 Commerce Building
Corpus Christi, Texas
Attorneys for Intervenor M. S. Garriga, Roman
Catholic Bishop of the Diocese of Corpus Christi

s/ T. M. DOYLE
T. M. DOYLE
Defendant and Cross-Defendant

s/ JOHN J. MEEHAN
JOHN J. MEEHAN
Defendant and Cross-Defendant

s/ J. PETER GRACE
J. PETER GRACE
Defendant and Cross-Defendant

s/ REV. PATRICK J. PEYTON, C.S.C.
REV. PATRICK J. PEYTON, C.S.C.
Defendant and Cross-Defendant,
Acting Individually and as a Member of the
Congregation of Holy Cross Under Valid Authority
of His Lawful Religious Superior

s/ CHRISTOPHER GREGORY
CHRISTOPHER GREGORY
Sometimes Known as Brother Leo, O.C.S.O.,
Defendant and Cross-Defendant, Acting
Individually and as a Religious of the Cistercian
Order of the Strict Observance Under Valid
Authority of His Lawful Religious Superior

BAKER, BOTTS, SHEPARD & COATES
1600 Esperson Building
Houston 2, Texas

s/ DENMAN MOODY
DENMAN MOODY
Attorneys for Defendants and Cross-Defendants
Doyle, Meehan, Grace, Peyton and Gregory
HENRIETTA K. ARMSTRONG
Defendant and Cross-Defendant
THOMAS M. ARMSTRONG
Defendant and Cross-Defendant (pro forma)
LAWRENCE E. WOOD
Defendant and Cross-Defendant

KLEBERG, MOBLEY, LOCKETT & WEIL
Jones Building
Corpus Christi, Texas

By:

M. HARVEY WEIL
Attorneys for Defendants and Cross-Defendants
Henrietta K. Armstrong, Joined Pro Forma By
Her Husband, Thomas M. Armstrong, and
Lawrence Wood

THE JOHN G. AND MARIE STELLA KENEDY
MEMORIAL FOUNDATION
Defendant and Cross-Defendant

By: BAKER, BOTTS, SHEPARD & COATES
1600 Esperson Building
Houston 2, Texas

s/ DENMAN MOODY
DENMAN MOODY

WAGGONER CARR
Attorney General of the State of Texas

By:s/ J. GORDON ZUBER
J. GORDON ZUBER
Assistant Attorney General

s/ JACOB S. FLOYD
JACOB S. FLOYD
Independent Executor of the Estate of
Sarita Kenedy East, Deceased

ALICE NATIONAL BANK OF ALICE, TEXAS
Independent Executor of the Estate of Sarita Kenedy East, Deceased

By:s/ B.R. GOLDAPP
B.R. GOLDAPP

V

All temporary restraining orders heretofore issued by this Court are hereby vacated and dissolved, and by agreement of the parties hereto, they are hereby enjoined and restrained from disposing of, dissipating, removing from the territorial limits of the State of Texas, or expending any monies and/or royalties heretofore or hereafter received by The John G. and Marie Stella Kenedy Memorial Foundation, its officers, directors, members, agents, employees, and representatives, insofar as any such monies and/or royalties have heretofore been or may hereafter be received under the terms of any and all of the three following described instruments, to-wit:

(1) That certain instrument dated April 21, 1960, recorded in the Oil & Gas Records of Kenedy County, Texas, in Volume 9, Pages 544 et seq.,

(2) That certain instrument dated February 13 1960, recorded in the Deed Records of Jim Hogg County, Texas, in Volume 42, Pages 52, et seq. and

(3) That certain instrument dated January 2, 1961, recorded in the Oil & Gas Lease Records of Jim Hogg County, Texas, in Volume 50, Page 305, et seq.

EXCEPTED, HOWEVER, from this temporary injunction and the terms and provisions thereof are any and all monies expended heretofore, or which may be expended hereafter, for the payment of taxes, or for payment of compensation to bookkeepers or auditors, and for investment in term United States Government securities; and they are further restrained and enjoined from assigning, transferring, conveying, pledging, mortgaging, or hypothecating any part or portion of the rights and/or properties purporting to pass from Sarita K. East or The John G. and Marie Stella Kenedy Memorial Foundation under the terms of any and all of said three instruments

above described; PROVIDED, HOWEVER, that nothing contained in the temporary injunction shall in any wise be construed to affect, interfere with, or terminate in any manner, the existing rights of the said John G. and Marie Stella Kenedy Memorial Foundation, its officers, members, directors, agents, and representatives, to demand, collect, and receive all monies and/or royalties due, or to become due, from any person, firm, or corporation, under the terms of said three written instruments above described.

This is an interlocutory order and shall remain in full force and effect until further ordered by this Court.

VI

All costs of suit shall abide the issue.

VII

And it further appearing to the court that a temporary injunction has heretofore issued out of the District Court of Kenedy County, Texas, 105th Judicial District, in Cause No. 85, styled, Arnold R. Garcia, Temporary Administrator of the Estate of Sarita K. East, Deceased, vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, as a result of which, the parties hereto have refrained from executing and delivering the assignment, a copy of which is attached to this Judgment as Exhibit C;

IT IS THEREFORE ORDERED, CONSIDERED, ADJUDGED AND DECREED by the Court that all language hereinabove contained inconsistent with this finding is hereby amended and modified to conform hereto, and the proper parties and persons are hereby authorized and directed to execute, acknowledge and deliver such assignment upon the vacation or avoidance of such temporary injunction and the temporary injunction hereinabove provided for.

RENDERED AND SIGNED this 1st day of September, 1964.

s/ C. W. Laughlin
C. W. LAUGHLIN, *District Judge.*

ARTICLES OF AMENDMENT TO THE ARTICLES OF INCORPORATION OF THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

Pursuant to the provisions of Article 4.03 of the Texas Non-Profit Corporation Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation which add thereto a new Article IX dealing with the membership of the Foundation and a new Article X dealing with the contributions to be made by the Foundation:

1. The name of the Corporation is The John G. and Marie Stella Kenedy Memorial Foundation.

2. The following amendment to the Articles of Incorporation was adopted by the Corporation on Sept. 1, 1964.

The Articles of Incorporation are hereby amended by adding thereto a new Article IX and a new Article X reading as follows:

ARTICLE IX

(a) The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

(i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;

(ii) at least two other practical Catholics;

(iii) at least two members who shall be non-Catholic.

(b) At no time shall the membership be less than sixty percent (60%) Catholic, the said sixty percent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent (33⅓%) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

(c) This Article IX of the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

ARTICLE X

(a) The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

(b) All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

(c) This Article of the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

3. The amendment was adopted in the following manner:

The amendment was adopted at a meeting of the members of the Foundation held on September 1, 1964, at which a quorum was present, and the amendment received at least two-thirds of the votes which members present or represented by proxy at such meeting were entitled to cast.

DATED———————; 19—

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

By ———————————
Its President

———————————
Its Secretary

———

THE STATE OF TEXAS)
COUNTY OF JIM WELLS)

I, ———————, a Notary Public, do hereby certify that on this —— day of ————, 196—, personally appeared before me ———————————, and being duly sworn, declared that he is President of the Corporation executing the foregoing document, that he signed the foregoing document in the capacity therein set forth, and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

Notary Public in and for
Jim Wells County, Texas
My Commission Expires:————

(Notarial Seal)

———

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

Certified Copy of Amendments to By-Laws

I, _____, Secretary of The John G. and Marie Stella Kenedy Memorial Foundation, a non-profit, charitable corporation organized and existing under the laws of the State of Texas, do hereby certify that at a meeting of the members and directors of such Foundation which was duly held in accordance with its By-Laws, the By-Laws of such Foundation were duly amended to cause Article III thereof to be amended to add as a part thereof new paragraphs 1a, 1b, and 1c reading as hereinbelow set forth, to add a new Article XI thereto reading as hereinbelow set forth, and to re-number the present Article XI of such By-Laws as Article XII, and that such amendments to its By-Laws of such Foundation are duly effective and have not been rescinded or modified in any manner.

1a. The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

(i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;

(ii) at least two other practical Catholics;

(iii) at least two members who shall be non-Catholic.

1b. At no time shall the membership be less than sixty percent (60%) Catholic, and said sixty percent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent (33⅓%) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

1c. Paragraphs 1a and 1b above of this Article III of the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

ARTICLE XI

1. The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

2. All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

3. This Article XI of the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

EXECUTED this — day of ————, 19—.

————, Secretary
The John G. and Marie Stella
Kenedy Memorial Foundation

(SEAL)

THE STATE OF TEXAS)
COUNTY OF JIM HOGG)

KNOW ALL MEN BY THESE PRESENTS: That The John G. and Marie Stella Kenedy Memorial Foundation ("Grantor" herein), a non-profit corporation organized and existing under the laws of the State of Texas, joined herein by Jacob S. Floyd and Alice National Bank, a national banking association with its place of business in Alice, Texas, jointly acting herein only in their capacity as executors of the Estate of Sarita K. East, deceased, for and in consideration of Ten Dollars ($10.00) cash and other good and valuable considerations in hand paid by the Sarita Kennedy East Foundation, Inc., a non-profit corporation organized and existing under the laws of the State of New York ("Grantee" herein), the receipt and sufficiency of which are hereby acknowledged, have GRANTED, SOLD, CONVEYED and ASSIGNED, and do hereby GRANT, SELL, CONVEY and ASSIGN unto Grantee an undivided seven-eighths (7/8ths) interest in all oil, gas and other minerals owned by Sarita K. East at the time of her death according to the records of Jim Hogg County, Texas, (said oil, gas and mineral interests of Sarita K. East having been acquired under her will and being now owned by Grantor), in, under and that may be produced and saved from the following described lands situated in Jim Hogg County, Texas, to-wit:

> 43,263.46 acres of land, more or less, known as the San Pablo Ranch and fully described in a royalty deed from Sarita K. East to Reverend E.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese, dated September 1, 1947, of record in Vol. 28, Pages 519-21 of the Jim Hogg County Deed Records,

and, in addition, an undivided seven-eighths (7/8ths) of all royalty interests owned by Grantor according to said records in all oil, gas and other minerals produced and saved from the above described lands.

This sale conveyance is expressly made, and is expressly accepted by Grantee, subject to all oil, gas and mineral leases now effective in respect of said lands, and any of them, but covers and includes seventh-eighths (7/8ths) of all royalties payable under any and all of such oil, gas and mineral leases now in effect or hereafter executed in respect of said Lands; provided, however, that this sale and conveyance, in so far as it relates to an undivided seventh-eighths (7/8ths) interest in said oil, gas and mineral interests owned by Sarita K. East at the time of her death, is further expressly made, and is further expressly accepted by Grantee, subject to (but said undivided seven-eighths (7/8ths) interest shall bear only its proportionate seven-eighths (7/8ths) part of) (i) all royalty interests assigned or conveyed of record in Jim Hogg County, Texas, by Sarita K. East prior to her death (but only to the extent such royalty interests shall be subsisting at any time in question) out of any portions of the lands hereinabove described in favor of any persons, including specifically but not limited to the royalty interests assigned or conveyed by the following instruments:

GRANTEE	DATE OF INSTRUMENT	Recorded in Deed or Lease * Records of Jim Hogg County at VOLUME	PAGE
E.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese	September 1, 1947	28	519 et seq.
Stella Lytton	September 1, 1947	28	532 et seq.
Stella Lytton	September 1, 1947	28	530 et seq.
Stella Lytton	February 28, 1955	39*	103 et seq.
Stella Lytton	June 22, 1956	41*	267 et seq.
Stella Lytton	May 22, 1957	38*	519 et seq.
L.E. Turcotte	September 1, 1947	28	534 et seq.
L.E. Turcotte	September 1, 1947	28	536 et seq.
L.E. Turcotte	February 28, 1955	39*	101 et seq.
L.E. Turcotte	June 22, 1956	41*	269 et seq.
L.E. Turcotte	May 22, 1957	38*	522 et seq.
Irene Putegnat	October 19, 1947	28	525 et seq.
Irene Putegnat	September 1, 1957	28	527 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	91 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	93 et seq.

and (ii) those two certain annual lifetime annuities of Twenty-Five Thousand Dollars ($25,000.00) payable in equal monthly installments to each, respectively, of Stella Turcotte Lytton and Louis Edgar Turcotte out of the first royalties accruing monthly to Grantor and to Grantee from production under any presently existing or future oil and gas leases upon the above described lands as provided under Article III of the Will of Sarita K. East, deceased, as amended under Second of the Fourth Codicil to said Will. Delivery of payment of all royalty deliverable or payable to Grantee shall be made in the same manner as is provided for the delivery of payment of royalties to Grantor under any present or future mineral lease affecting said lands.

Grantor, for itself and its successors and assigns, hereby reserves and hereby excepts from the interest conveyed to Grantee hereunder, subject to the further provisions hereof, all rights in respect of the development of said hereinabove described lands for the production of oil, gas and other minerals, and all rights in respect of any subsequent leasing of said hereinabove described lands or any portion thereof, without the necessity of any joinder by Grantee, for the development of oil, gas or other minerals, and all rights to receive the entirety of any amounts which may be receivable under such lease either as bonus monies or delay rentals. It is hereby further expressly agreed and understood between Grantor and Grantee that Grantor, its successors and assigns, shall not make any oil, gas or mineral lease in respect of any of the above lands which provides (i) for a royalty of less than one-eighth (1/8th) of all oil produced, saved and sold, of less than one-eighth (1/8th) of the value of all gas produced, saved and sold, or used for commercial purposes and of less than one-eighth (1/8th) of the value of any other minerals produced from said premises and sold or used for commercial purposes, (ii) for a bonus, whether present or deferred, in excess of

$10,000 or $2 per acre for the lands leased, whichever shall be the lesser amount, (iii) for delay rentals in excess of $2 per acre per year, or (iv) for pooling for any purposes of any lands subject to any such lease with any other lands except that Grantee through its acceptance hereof agrees that it will not unreasonably refuse to enter into such pooling agreements in regard to the herein described lands as may be approved for execution by Grantor, its successors and assigns. In the event oil, gas or other minerals are produced from the above described lands, or any part thereof, by Grantor, its successor and assigns, other than under a lease or leases, Grantee shall be entitled to receive a free royalty upon such production equivalent to the fraction or portion herein conveyed to Grantee of the minimum royalties above stated, i.e. seven eighths (7/8ths) of one-eighth (1/8th).

The interest herein sold and conveyed to Grantee shall cease, terminate and revert to Grantor, its successors and assigns, when Grantee shall have received from the gross proceeds of production attributable to such interest (it being expressly understood and agreed in this connection that production attributable to such interest shall not include production attributable to the aforementioned existing royalty or annuity interests to which the interest herein conveyed may now be subject, nor shall it include production attributable under any circumstances to the interest retained by Grantor hereunder or to the interest of any lessee) an aggregate sum of Fourteen Million Four Hundred Thousand Dollars ($14,400,000.00) provided, however, if any of the proceeds of the interest herein conveyed to Grantee shall be withheld for any reason involving the title to the interest herein conveyed to Grantee then Grantee shall not be deemed to have received or realized any such proceeds from the interest until, and only to the extent that, the proceeds from the sale thereof have actually been received by

Grantee, or if, at any time whatsoever either before or after the receipt of the full aggregate sum of such amount, Grantee shall be compelled, for any reason involving the title to the interest herein conveyed to Grantee, to make any payment or restitution on account of proceeds theretofore received by Grantee, then, at the time any such payment or restitution is made, the said aggregate sum shall from the date of such payment or restitution be increased by an amount equal to such payment or restitution; and provided, further, that following the receipt by Grantee of such aggregate sum (as the same may be increased on account of any payment or restitution by Grantee of any of the proceeds of such mineral interest), the reversionary interest in any such amounts withheld from, or as to which payment or restitution from Grantee may be required, shall accrue to Grantor, its successors and assigns. No loss or failure of the title shall have the effect of reducing the aforesaid sum of Fourteen Million Four Hundred Thousand Dollars ($14,400,000.00).

Grantee, its successors and assigns, shall be responsible for and agrees to hold Grantor harmless from the payment of ad valorem, gross production, severance, gift, inheritance and any and all other taxes of whatsoever kind or character now existing or hereafter levied which may in any manner be attributable to the interest herein sold and conveyed to Grantee.

It is expressly understood and agreed by and between Grantor and Grantee herein that this transfer and conveyance is made pursuant to the terms of the Judgment of the District Court of Jim Wells County, Texas, in Cause No. 12,074, styled Lee H. Lytton, Jr., et al vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, dated —— day of ———, 1963, and that in the event the interest herein assigned and conveyed to Grantee fails to yield or pay or accrue to Grantee, the full sum of Fourteen Million Four Hundred Thousand

Dollars ($14,400,000.00), then and in that event, Grantee shall have no recourse upon Grantor or the executors of the Estate of Sarita K. East, deceased, for any further sums of money or interest whatsoever.

TO HAVE AND TO HOLD the above described mineral interest, together with all and singular the rights and appurtenances of every kind and character thereto in any wise belonging without limitation other than as herein expressly provided, unto Grantee, its successors and assigns, and Grantor does hereby bind itself and its successors to warrant and forever defend all and singular the said mineral interest herein sold and conveyed to Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof by, through or under Grantor.

Anything herein to the contrary notwithstanding, it is understood and agreed that in the event Grantee herein shall assign or transfer (not including any mortgage or similar encumbrance) the interest conveyed herein by Grantor to Grantee or any portion thereof, then and in such event the restrictions and limitations with respect to the amount of bonuses and delay rentals and provisions in regard to pooling set forth in clauses (ii), (iii) and (iv) on page 4 hereof shall not apply.

Grantor, for itself, its successors and assigns, hereby agrees that if all of any portion of said above described lands shall for any reason cease to be subject to the terms of any oil, gas and other minerals lease, whether as a result of the termination of any present or future oil, gas and other minerals lease, it will not unreasonably refuse to execute another oil, gas and mineral lease of the nature hereinabove contemplated on such unleased premises.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed by its officers, hereunto duly authorized, and to be affixed with its corporate seal, this the —— day of ————, 196 .

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

By: _____
President

GRANTOR

ATTEST:

_____
Secretary

ALICE NATIONAL BANK

By: _____
President

ATTEST:

_____
Cashier

Executor of the Estate of
Sarita K. East, Deceased,
February 11, 1961

FILED

at 3:45 o'clock p.m.

SEP 1 1964

Pauline Clinkscales
Clerk District Court
Jim Wells County, Tex.

BY _____ DEPUTY

APPENDIX F

COURT OF CIVIL APPEALS OF TEXAS
SAN ANTONIO

No. 14633

CHRISTOPHER GREGORY,
Appellant,

v.

LEE H. LYTTON, JR., *et al.*,
Appellees.

Nov. 1, 1967

Rehearing Denied Dec. 27, 1967.

KLINGEMAN, *Justice.*

This is an appeal from an order dismissing a petition in the nature of a bill of review in Cause No. 13850 in the District Court of Jim Wells County, 79th Judicial District, which bill of review was filed by appellant, Christopher Gregory, also referred to as Brother Leo, to review and set aside an order in Cause No. 12074, dated September 1, 1964, in the same court.

Appellant's only point of error is that the trial court erred in holding that the judgment in cause No. 12074 "is an interlocutory judgment and not a final judgment, and for such reason is not properly the subject of a suit in the nature of an equitable bill of review, and by reason of such holding in dismissing plaintiff's said suit for bill of review."

The principal question to be determined by this Court is whether the judgment of September 1, 1964, is inter-

locutory, and therefore not subject to bill of review, although appellee Bishop Drury has a counterpoint to the effect that even if the judgment in Cause No. 12074 was final, which he asserts is not the case, the record on its face shows that such judgment is based on a contract dated October 28, 1963, containing strict provisions for specific performance, and the bill of review of appellant filed on March 8, 1966, is thereby barred by limitation and laches.

The controversy involves the properties and affairs of Sarita K. East, who died on February 11, 1961. Prior to her death, Mrs. East organized and had incorporated under the Texas Non-Profit Corporation Act, the John G. and Marie Stella Kenedy Memorial Foundation, for religious, charitable and educational purposes. Initially, Mrs. East was the sole member thereof, but under date of February 11, 1960, Mrs. East appointed Jacob S. Floyd and Lee H. Lytton, Jr., as co-members of such foundation. Sometime thereafter she requested and received their resignations as members. On December 30, 1960, Mrs. East made an additional appointment of Christopher Gregory as co-member during her lifetime. The will of Sarita K. East, dated January 22, 1960, in addition to devises to a number of relatives and former employees, left the residue of her estate to her foundation. A First codicil to said will, bearing the same date as the will, named the Bishop of the Diocese of the Roman Catholic Church of Corpus Christi as her successor to membership in such foundation upon her death. Thereafter, Mrs. East made Second, Third, Fourth and Fifth Codicils to such will, and under the Third Codicil revoked the First Codicil and appointed Peter Grace, Christopher Gregory and Father Patrick J. Peyton as successor members to her after her death. In such will Edgar Turcotte, Jacob S. Floyd and Alice National Bank were named executors. A contest to such will was filed in Kenedy County by Raul Trevino and others claiming to be blood heirs at law of Sarita K. East, and such will

contest was pending at the time of the judgment of September 1, 1964. There was also pending at such time a suit in the District Court of Kenedy County to set aside certain inter vivos deeds from Sarita K. East to The John G. and Marie Stella Kenedy Memorial Foundation, and an injunction had issued out of the District Court of Kenedy County, Texas, in Cause No. 85, styled Arnold R. Garcia, Temporary Administrator of the Estate of Sarita Kenedy East, Deceased v. The John G. and Marie Stella Kenedy Memorial Foundation et al., wherein the parties thereto were enjoined from disposing or transferring certain purported assets of the foundation pending determination of the action.

Cause No. 12074 was commenced on the 9th day of April, 1961, by Lee H. Lytton, Jr., complaining of The John G. and Marie Stella Kenedy Memorial Foundation and others, including appellant, in which petition plaintiff asked that a temporary injunction issue pending trial of the case, enjoining appellant and others from withdrawing funds from the foundation, from executing any contracts affecting certain lands, and other injunctive relief, and that on final hearing the court enter its declaratory judgment that Lytton and Jacob S. Floyd were the only legal members of the foundation; that defendants Gregory and Grace be required to file an accounting with the court and to return to the defendant foundation any assets received by them as a result of undue influence practiced by them on Mrs. East, and other relief. Thereafter, various answers, cross-actions, amended pleadings, and petitions of intervention were filed in said case by various parties, some of them seeking relief similar to that asked by plaintiff Lytton. The temporary injunctive relief prayed for was granted by the court, and the temporary injunction was continued from time to time. As a result of motions to strike, the plea of intervention filed in said cause by Raul Trevino et al., was stricken and dismissed from said cause, and

the defendants in intervention, Alice National Bank, Edgar Turcotte and Jacob S. Floyd as Executors of the Estate of Sarita K. East, deceased, were dismissed from said suit insofar as said petition in intervention was concerned. An appeal therefrom was taken by Raul Trevino et al., and the Waco Court of Civil Appeals dismissed such appeal on the basis that it was not an appeal from a final judgment. Kimmel v. Lytton, Tex.Civ.App., 371 S.W.2d 927 (1963, writ ref'd).

On September 1, 1964, the trial court entered the order from which appellant sought a bill of review. The order recites that all parties to such action have approved the judgment, and on such judgment under the heading "Approved as to Form and Substance" is found the signature of appellant, Christopher Gregory, together with the signatures of other parties and attorneys in said cause. The order decrees certain people, not including appellant, to be the present and only legally authorized and elected members, directors, and officers of The John G. and Marie Stella Kenedy Memorial Foundation; confirms and ratifies certain amendments to the Articles of Incorporation of such Foundation; vacates and dissolves temporary restraining orders theretofore issued; enjoins and restrains all parties from disposing of, dissipating, removing from the territorial limits of the State of Texas, or expending any money or royalties heretofore or hereafter received by the Foundation under three instruments described in such order, with certain exceptions as to payment of taxes, etc.; dismisses various parties to the suit; recites that a temporary injunction has heretofore issued out of the District Court of Kenedy County, Texas, as a result of which the parties hereto have refrained from executing and delivering an assignment of a production payment in oil, gas and other minerals in certain lands, from the John G. and Marie Stella Kenedy Memorial Foundation to the Sarita Kenedy East Foundation, Inc., a copy of which instrument is attached to the judgment as an Exhibit, and the proper

parties are authorized to execute, acknowledge, and deliver such assignment upon the vacation or avoidance of such temporary injunction hereinabove provided for. Said judgment further recites: "This is an interlocutory order and shall remain in full force and effect until further ordered by this Court," and provides that "All costs of suit shall abide the issue."

Appellant contends that the judgment of September 1, 1964, did dispose of all issues and parties in the case; that the injunction and order authorizing and directing a future act were merely incidental to the main relief granted; that the word "interlocutory" as used in such judgment was merely intended to show that the injunction therein issued was temporary in nature and would be dissolved by further order of the court when no longer necessary; that the mere fact that disposition of costs remain to be determined does not prevent a judgment from being final; and that evidence aliunde the judgment and pleadings in such cause is not determinative of the finality of such judgment. Appellant cites a number of cases in support of his contention, but, insofar as we have been able to ascertain, none of such cases involved an agreed judgment and in none of them was it expressly stated by the trial court that the judgment was interlocutory.

Appellees contend that the judgment was not final because: (1) It was expressly stated otherwise in such judgment. (2) The order was interlocutory in its nature. (3) Further action of the court of some kind or character is contemplated and actually indispensible. (4) The costs of suit were left open and not taxed or paid. (5) The court itself, in addition to signing the order containing the language that it was interlocutory, made a docket entry indicating that the order was interlocutory and not final. (6) The clerk of the court continued to carry such case as an active case and not as a case closed by final judgment. (7) Some of the parties to such suit continued

to file additional pleadings and other papers in said cause after the entry of the judgment. (8) The order standing alone is interlocutory in nature, but that such order expressly refers to a collateral settlement agreement which should be approved and judgment entered in accordance with such settlement agreement, which was admitted into evidence as an exhibit, makes the judgment in Cause No. 12074 contingent on the results of the will contest in Kenedy County, and when such judgment of September 1, 1964, is construed with the collateral agreement it is obvious that the judgment under attack is interlocutory and not final.

[1] The general rule is that a judgment to be final must dispose of all issues and parties in a case. North East Independent School District v. Aldridge, 400 S.W.2d 893 (Tex. Sup. 1966); Hargrove v. Insurance Inv. Corp., 142 Tex. 111, 176 S.W.2d 744 (1944). But, as stated by Justice Calvert in North East v. Aldridge, supra, "The rule is deceiving in its apparent simplicity and vexing in its application." In 4 McDonald, Texas Civil Practice § 17.03 (1950), it is stated: "There is a great body of precedent upon the difficult question of whether a particular decision of the court represents a 'final' or an 'interlocutory' judgment. • • • It thus frequently becomes a problem in construction to determine whether the particular decision was 'final' for the purpose of the question before the court. This problem must be resolved by a determination of the intention of the court gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of the parties."

It appears clear that the court intended that such judgment be interlocutory, because not only does it expressly state so in such judgment, but in the judgment dismissing appellant's bill of review in the case on appeal the trial court makes findings, among others, that it was the intention of the parties and the court to enter a temporary order; that "The word 'interlocutory' contained

in the temporary order entered in Cause No. 12,074 was used with cautious and deliberate design;" that by said wording the temporary order entered in said cause was expressly made interlocutory in its entirety.[1] As to the

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[1] Other findings made by the court were: "(1) that at the time the temporary order was entered there was pending a contest of the Last Will and Testament of Sarita K. East, Deceased, being Cause No. 348 (hereinafter called the 'will contest') on the docket of the County Court of Kenedy County, Texas; (2) that the parties and this court in Cause No. 12,074 clearly recognized that the outcome of the will contest might substantially affect Cause No. 12,074 because the Last Will and Testament of Sarita K. East, Deceased, under attack in said will contest, devises and bequeaths her residuary estate to The John G. and Marie Stella Kenedy Memorial Foundation (hereinafter called the 'Foundation'); (3) that because the will contest involved assets of Sarita K. East, Deceased, which may, or may not be, ultimately administered by the Foundation, neither the parties nor the Court on September 1, 1964, intended to have entered a final judgment in said Cause No. 12,074; (4) that at the time the temporary order was entered there was also pending a suit to set aside certain inter vivos deeds from Sarita K. East, Deceased, to the Foundation, the same being Cause No. 85, styled Arnold R. Garcia vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al. on the docket of the District Court of Kenedy County, Texas, 105th Judicial District (hereinafter called the 'deed suit'); (5) that the parties and this Court in Cause No. 12,074 recognized that the outcome of the deed suit might substantially affect Cause No. 12,074 because said deed suit involves a substantial portion of the Foundation assets; (6) that consequently neither the parties nor the Court on September 1, 1964, intended to have entered a final judgment in Cause No. 12,074, due to the bearing of the deed suit upon said Cause No. 12,074; (7) that there existed the possibility of a number of issues or the entire action in Cause No. 12,074 being rendered moot if Plaintiffs in both the will contest and the deed suit were successful; (8) that the parties in Cause No. 12,074, intended to enter a temporary order which may become a final judgment in the event Plaintiffs in both the will contest and the deed suit are unsuccessful, but the parties in Cause No. 12,074 did not intend to provide for alternative judgments based upon other possible results in the will contest and the deed suit; (9) that although the temporary order entered in Cause No. 12,074 might lead to a final judgment, the outcome in the will contest and deed suit must first be known;

intentions and conduct of the parties, such judgment of September 1, 1964, recites that all parties to such action have approved the same, and the judgment contains the signatures of appellant and other parties and attorneys in such suit. The record reflects that the court made a docket entry that such order was interlocutory; that on the docket of such court said case was continued to be carried as an active case, and after the date of such judgment there were entries made on different occasions, such as "passed," and that some of the parties continued to file additional pleadings in the case.

[2] This Court in Culicchia v. Taormina, Tex. Civ. App., 332 S.W.2d 803, 804 (1960, no writ), stated:

> "In determining whether the judgment was a final one, we are limited largely to what the court stated by the judgment, and what might have been or could have been done is not the issue. There may be more than one way to write a judgment in an accounting suit, but we need only to determine what was done in this case.
>
> "The judgment was carefully drawn and shows painstaking care in disposing of complex accounting

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(10) that it was the intention of the parties and the Court to enter a temporary order only in Cause No. 12,074 because of the various contingencies herein described; (11) that the settlement agreement executed by the parties and the agreed temporary order entered pursuant thereto in Cause No. 12,074 recognizes the possible effect which the will contest and the deed suit might have on any future final judgment in Cause No. 12,074 included in the temporary order a temporary injunction enjoining the parties from 'disposing of, dissipating, removing from the territorial limits of the State of Texas, or spending any monies and/or royalties heretofore or hereafter received by The John G. and Marie Stella Kenedy Memorial Foundation, its officers, directors, members, agents, employees and representatives * * *,' which temporary injunction is still in full force and effect; (13) that the court therefor provided in its temporary order in said Cause No. 12,074, that all costs of suit would not be taxed until every entry of final judgment; and (14) that some of the parties amended their pleadings subsequent to the entry of the temporary order in Cause No. 12,074, * * *."

> problems. Throughout the judgment, the court makes rather clear what was intended, and while it is true that an instrument is what it is, without regard to the label appended to it, when a judgment contains words and internal evidences of its nature, we will not ignore them. • • • "

See also the recent case of State v. Starley, 413 S.W.2d 451 (Tex. Civ. App.—Corpus Christi, 1967).

[3] In addition to the express statement in the judgment by the trial court to the effect that "This is an interlocutory order and shall remain in full force and effect until further ordered by this court," there are certain judicial acts to be performed by the trial court in said cause in the future. At some future date, it will be necessary for the trial court to act upon the temporary injunction provided for in such order, to assess all costs of suit, and to determine the effect of any change in the temporary injunction issued in the District Court of Kenedy County. See 33 Tex. Jur. 2d Judgments § 85 (1962).[2]

It is our opinion that appellees' counterpoint to the effect that the trial court correctly held that the judgment in Cause No. 12074 is interlocutory and not the subject to attack by Bill of Review and appellant's suit was properly dismissed, should be sustained. In view of such holding, we do not pass upon appellee Father Drury's

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[2] "A final judgment is one that determines the rights of all the parties to the suit, and disposes of all the issues involved on their merits. Thus, a judgment is final where no further action adjudicating the rights of the parties may be taken by the court. But to constitute a final judgment it is not sufficient that the court has made a ruling that should logically lead to final disposition of the cause; the consequence of the ruling to the parties must be also declared. The very object of a suit is to adjudicate and declare respective rights so that the ministerial officers can with certainty carry the judgment into execution without the ascertainment of additional facts; where this is not the case the judgment is not final."

counterpoint that the Bill of Review of appellant is barred by limitation and laches.

Appellant's sole point of error is overruled. The judgment of the trial court is affirmed.

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-81-CA-380

CHRISTOPHER GREGORY,

Plaintiff

v.

THOMAS J. DRURY, BRUNO R. GOLDAPP, ELENA S. KENEDY, LEE H. LYTTON, JR., KENNETH ODEN, MARK WHITE, Attorney General of the State of Texas, and THE ALICE NATIONAL BANK,

Defendants

AMENDED COMPLAINT

PARTIES

1. The plaintiff Christopher Gregory ("Gregory") is a citizen of the United States who resides in Massachusetts.

2. Defendant Thomas J. Drury ("Drury") is the Bishop of the Diocese of Corpus Christi of the Roman Catholic Church, and purports to be a member of the John G. and Marie Stella Kenedy Memorial Foundation ("the Foundation"). Drury resides at 620 Lipan Street, Corpus Christi, Texas.

3. Defendant Bruno R. Goldapp ("Goldapp") purports to be a member of the Foundation, and resides at 721 First Street, Alice, Texas.

4. Defendant Elena S. Kenedy ("Kenedy") purports to be a member of the Foundation and resides in Sarita, Texas.

5. Defendant Lee H. Lytton, Jr. ("Lytton") purports to be a member of the Foundation and resides in Sarita, Texas.

6. Defendant Kenneth Oden ("Oden") is a lawyer in Alice, Texas and purports to be a member of the Foundation. Oden resides in or near Alice, Texas.

7. Defendant Mark White ("White") is and has been since 1978, the Attorney General of the State of Texas, with an office in Austin, Texas. White resides in or near Austin, Texas.

8. Defendant Alice National Bank ("the Bank") is organized under applicable national banking laws with a principal place of business in Alice, Texas. The bank is the executor of the estate of Sarita Kenedy East.

JURISDICTION AND VENUE

9. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343 and 28 U.S.C. § 1331.

10. Defendant Mark White, Attorney General of the State of Texas, resides in or near Austin, Texas which lies within this judicial district and division. Venue is therefore proper pursuant to 28 U.S.C. § 1392(a).

FACTUAL BACKGROUND

11. On or about January 22, 1960, Sarita Kenedy East ("East") established the John G. and Marie Stella Kenedy Memorial Foundation ("the Foundation"), a charitable foundation established under the Texas Non-Profit Corporation Act.

12. The documents which established the Foundation were drafted by East's attorneys in Houston, Texas, and were executed by East in their offices. East executed a will in which she left the bulk of her estate to the Foundation at the same time she executed the documents which established the Foundation.

13. East was the only member of the Foundation at the time of its establishment. Pursuant to the articles of incorporation of the Foundation, the members of the Foundation have full power to appoint the Foundation's directors.

14. Between January 22, 1960 and December 30, 1960, East executed a number of documents in which she purported to appoint additional members to the Foundation. In February, 1960, East named two additional members of the Foundation, Lytton and Jacob Floyd ("Floyd") (now deceased). Lytton and Floyd subsequently resigned from membership in the Foundation at East's request.

15. On December 30, 1960 East, who was then the only member of the Foundation, appointed Gregory the second member of the Foundation.

16. On February 11, 1961 East died, leaving Gregory the sole surviving member of the Foundation.

17. On or about April 19, 1961 Lytton filed suit in the 79th District Court of Jim Wells County, Texas, against Gregory and others, seeking to have Gregory removed from membership in the Foundation and to have himself reinstated as a member. Lytton alleged as reason for the action that Gregory had exercised undue influence over East, which resulted in his and Floyd's voluntary resignations from the Foundation.

COUNT I

18. Gregory repeats and incorporates herein by reference the allegations contained in paragraphs 1 through 17 above.

19. Commencing in or about April, 1961 and continuing through June, 1981, the defendants White (and White's predecessors in the office of Attorney General of Texas), Drury (and Drury's predecessor Bishop Garriga, now deceased), Goldapp, Kenedy, Lytton, Oden and the

Bank (hereinafter referred to collectively as "the defendants"), along with Floyd, Robert K. Jewett ("Jewett") and Denman Moody ("Moody"), both of whom are lawyers in Houston, Texas, and others whose identities are presently unknown to Gregory, combined and conspired for the common purpose of depriving Gregory of his right to trial, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and his right to trial by jury, guaranteed by Texas law.

20. In furtherance of the conspiracy described in paragraph 19 above, the defendants, individually and jointly, along with their co-conspirators, have undertaken a course of conduct which included the following actions:

(a) On or about April 19, 1961, Lytton, in combination with others, filed a lawsuit in a state court of Texas against Gregory and others, which was without foundation and which was brought in bad faith. Lytton alleged that Gregory had exercised undue influence over East, causing her to request Lytton's resignation from the Foundation. In accordance with Texas law, White's predecessor in the office of Attorney General of Texas was made a party to the lawsuit. On information and belief, Lytton brought this lawsuit not intending to prosecute it, but for the purpose of coercing Gregory into resigning from the Foundation and naming Lytton in his place. Several months after initiation of the lawsuit, Gregory retained a lawyer in Washington, D.C., William R. Joyce, Jr. ("Joyce"), to represent him in connection with that lawsuit.

(b) Soon after initiation of the lawsuit, the defendants and their co-conspirators further sought to exercise coercion, duress and undue influence upon Gregory through his position as a member of the Order of Cistercians of the Strict Observance, also known as the Trappists, in an attempt to force Gregory to accede to their wishes. On information and belief, they caused Gregory to be threatened by his religious superiors with excommunica-

tion from the Roman Catholic Church and expulsion from the Trappist Order, if he did not give up his position as a member of the Foundation without a trial on the merits of the lawsuit against him.

(c) In the spring of 1962, Gregory was called to a meeting in Philadelphia by his religious superiors where he was told to discharge Joyce as his counsel, and to accede to the defendants' demands. On information and belief, the defendants and their co-conspirators had induced Gregory's religious superiors to hold this meeting and to order Gregory to cooperate. Gregory refused to give up his right to be a member of the Foundation and his right to a trial of the charges against him.

(d) The defendants and their co-conspirators continued to exercise coercion and duress upon Gregory. Finally, in May, 1962, Gregory signed a resignation from the Foundation as a result of the orders of his religious superiors. Gregory knew, however, that the resignation would not become effective until it was accepted by a vote of the Foundation's directors, of which he was one.

(e) The defendants and their co-conspirators demanded that Gregory also enter into a settlement agreement which would resolve the pending litigation without trial on the merits. Gregory refused to consent to the proposed settlement. In an effort to coerce Gregory into consenting, on information and belief, the defendants caused him to be sent to a monastery in Chile in the winter of 1963 where he would be unable to contact his counsel and would be more susceptible to their coercion.

(f) While in Chile, Gregory revoked the resignation which he had signed in May, 1962 but which had never been made effective by action of the Foundation's directors. Gregory sent his written revocation of resignation to his counsel, who filed it with the Texas court and sent a copy to Oden's partner, Floyd.

(g) The defendants and their co-conspirators continued to seek Gregory's consent to a settlement of the lawsuit through their course of coercion. As a result of their continued efforts, Gregory's will was eventually overcome and he signed, in September, 1963 in Chile a settlement argeement urged by the defendants. He signed that agreement only conditionally, however, with a written statement of the conditions upon which he consented attached to the agreement.

(h) Several months after Gregory's conditional consent to the settlement, Gregory was ordered by his religious superiors to a meeting in Miami, Florida attended by Jewett, Oden and others of the defendants and their co-conspirators, as well as by Gregory's religious superior. At that meeting, in January, 1964, the defendants and their co-conspirators requested Gregory's further cooperation, and presented him with a new resignation and a power of attorney to sign. Despite threats by his religious superiors of excommunication from the Roman Catholic Church and expulsion from the Trappist Order if he did not sign, Gregory reasserted his own will and refused. In addition, Gregory orally revoked whatever conditional consent to the settlement he had previously given, and stated that Jewett was not authorized to represent his interests in any way.

(i) In June, 1964, Gregory was sent to a monastery in northern Canada which was even more remote than the monastery in which he was located in Chile. On information and belief, the defendants caused his relocation to Canada for the purpose of bringing even more duress and coercion to bear upon him. He was instructed by his religious superiors to speak to no one, including his attorney, Joyce, about the lawsuit while there.

(j) Despite Gregory's clear indication of his lack of consent to the settlement and his refusal to cooperate with the defendants, the defendants and their co-conspirators continued their attempts to overcome Gregory's will

and desires. As a result of the demands of his religious superiors, Gregory signed a memorandum prepared by others for his signature in July, 1964, addressed to his Abbott, Thomas Keating ("Keating"), in which he attempted to reconcile his refusal to cooperate with the defendants with his religious conscience.

(k) In late August, 1964, while Gregory was living in isolation in Canada and was not being informed about the progress of the litigation in Texas, Keating requested from Gregory his further cooperation with the settlement. On information and belief, this request by Keating was made at the instance of the defendants and their co-conspirators. Gregory reasserted his own will and refused to agree with the settlement. Nevertheless, on the advice of the defendants and their co-conspirators, Keating, purporting to act on behalf of Gregory but without authority to do so, sent a telegram on August 30, 1964 to Jewett assenting to the settlement.

(l) On September 1, 1964, at the request of the defendants and their co-conspirators, the trial court in Texas held a hearing at which the defendants and their co-conspirators represented to the trial judge that a settlement of the dispute had been reached. Neither Gregory nor his attorney, Joyce, had any notice of this hearing, and neither was present. At the hearing, Jewett, acting on behalf of the defendants and their co-conspirators, made the following representations to the court:

1. That Gregory's May, 1962 resignation from the Foundation was valid and effective. In fact, that resignation had been revoked in writing in September, 1963, which the defendants and their co-conspirators well knew.

2. That Gregory's alleged consent to the settlement terms was valid and unconditional. In fact, Gregory's consent, which had been only conditional when given, had been expressly revoked,

which the defendants and their co-conspirators well knew. In addition, certain terms of the alleged settlement agreement had been altered.

3. That the telegram from Keating, purporting to act on Gregory's behalf, to Jewett constituted the exercise of a valid and effective power of attorney, when the defendants and their co-conspirators knew that Gregory had repeatedly refused to sign a power of attorney and had not intended to empower Keating to give one on his behalf.

4. That Jewett represented Gregory's interests in the litigation, when Jewett, the defendants and the other co-conspirators knew that Gregory was represented by Joyce and that Gregory explicitly denied that Jewett was his lawyer.

(m) The defendants and their co-conspirators scheduled the hearing before the trial court for September 1, 1964 with the knowledge that Gregory could not be present because of his isolation in Canada. Moreover, they did not notify Gregory or his attorney, Joyce, of the hearing to insure that neither was present. Their purpose was to insure that the settlement agreement was confirmed as a judgment, and to insure that Gregory was not afforded a trial on the merits. Gregory's physical absence from the proceeding was necessary for the defendants to effect their scheme and bind him by judicial decree to a settlement to which he had not consented.

(n) Throughout the course of the litigation in the Texas state courts described above, White's predecessor in the office of Attorney General of Texas was obliged by state law to represent the public interest in that lawsuit, and was bound by his office to act in accordance with law. White's predecessor wholly failed and neglected to represent the public interest in that lawsuit. Moreover, on information and belief, White's predecessor approved

of the alleged settlement, which approval was required by law, for the improper and unlawful reason of insuring that all Foundation funds would be distributed in Texas instead of in accordance with the wishes of the foundress.

21. As a result of the conduct of the defendants and their co-conspirators described in paragraph 20 above, the trial court entered an interlocutory judgment on September 1, 1964 incorporating in full the terms of the alleged settlement agreement, without any trial on the merits or by jury.

22. Subsequent to the entry of the September 1, 1964 judgment, the defendants and their co-conspirators have resisted Gregory's attempts to reveal his lack of consent to the court, to vacate that judgment, and to obtain a trial on the merits and by jury. Among the actions of the defendants and their co-conspirators are the following:

(a) The defendants and their co-conspirators continued to exercise coercion, duress and undue influence on Gregory by causing him to continue to be threatened by his religious superiors with excommunication from the Roman Catholic Church and expulsion from the Trappist Order if he sought to upset the interlocutory judgment. Gregory nevertheless attempted to have that judgment vacated. Gregory was thereafter dismissed from the Trappist Order in March, 1966, as a result.

(b) In 1979, after resolution of a contest over the validity of East's will which caused the September 1, 1964 judgment to be interlocutory, White, acting on behalf of the defendants and their co-conspirators, requested that the trial court make the interlocutory judgment final and binding upon Gregory, despite the fact that Gregory contended that he had never consented to the settlement agreement, which White and the other defendants well knew, and despite their knowledge that Gregory did not consent at that time. White, by failing

to undo the wrong caused the public in and prior to 1964, perpetuated that wrong in violation of his duty under law.

(c) As a result of the actions of the defendants and their co-conspirators, the trial court made the interlocutory judgment final and binding on November 28, 1979 without any trial by jury or otherwise, on the merits of the complaint.

(d) The defendants and their co-conspirators continued to resist Gregory's efforts to obtain review of the judgments against him through June 15, 1981.

23. The conduct of the defendants and their co-conspirators described in paragraphs 20 and 22 above was undertaken for the purpose of depriving Gregory of the rights to trial and to trial by jury on the charges of undue influence brought against him by Lytton.

24. The conduct of the defendants and their co-conspirators described in paragraphs 20 and 22 above resulted in the deprivation of Gregory's rights to trial and to trial by jury, as the defendants and their co-conspirators intended.

25. As a result of the conduct of the defendants and their co-conspirators, Gregory has been wrongfully excluded from his position as a member of the Foundation and has been wrongfully prevented from directing use of the funds of the Foundation in accordance with East's desires as he should determine them.

26. The conduct of the defendants violates the Fifth and Fourteenth Amendments to the United States Constitution, as well as Texas law.

COUNT II

27. Gregory repeats and incorporates herein by reference the allegations contained in paragraphs 1 through 17 and 19 through 25 above.

28. White and his predecessors in office, as Attorneys General of the State of Texas, were acting under color of state law in actively participating in the combination and conspiracy described in paragraphs 19 through 22 above, with knowledge that their actions were likely to result in the deprivation of Gregory's constitutional rights.

29. The conduct of the defendants violates 42 U.S.C. § 1983.

WHEREFORE, the plaintiff Christopher Gregory requests that the Court, after trial, enter judgment in his favor and order the following relief:

1. Enjoin the defendant Alice National Bank and the defendants who purport to be members of the Foundation from disbursing, conveying or distributing any funds of the estate of Sarita Kenedy East or of the Foundation;

2. Order an audit of the defendant Alice National Bank and a full accounting from the Bank and from the defendants who purport to be members of the Foundation of all funds of the estate of Sarita Kenedy East and of the Foundation from February 11, 1961 through the present;

3. Order the defendants to resign as members and directors of the Foundation and to appoint Gregory as sole member as their successor;

4. Order the defendant Mark White, Attorney General of Texas, to approve on behalf of the State of Texas, the resignations of the defendants from the Foundation and the appointment of Gregory, as sole member, as is required under Texas law to effect such a change in the Foundation articles;

5. Award him the costs of this action; and

6. Such other and further relief as the Court deems just and proper.

THE PLAINTIFF DEMANDS A TRIAL BY JURY TO THE FULL EXTENT TO WHICH HE IS ENTITLED BY LAW.

Dated: March 30, 1982

CHRISTOPHER GREGORY

By his attorneys,

/s/ (orig. signed)
JAMES D. ST. CLAIR, P.C.
BARBARA L. MOORE
HALE AND DORR
60 State Street
Boston, Massachusetts 02109
(617) 742-9100

Of Counsel:

/s/ (orig. signed)
JAMES R. WEDDINGTON
FRIEDMAN, WEDDINGTON AND HANSEN
515 Stewart Title Building
812 San Antonio Street
Austin, Texas 78701

APPENDIX H

REPUBLIC OF CHILE)
PROVINCE AND CITY OF SANTIAGO)
EMBASSY OF THE UNITED STATES) ss
OF AMERICA)

THIS IS TO CERTIFY THAT I first met Brother Leo Gregory, o.c.s.o. in August 1963 in Santiago de Chile. At that time he was residing at the Trappist Monastery in Las Condes. He came to me seeking advise as to his obligations as a religious faced with certain commands given him by his Superiors in reference to a civil law-suit in Texas involving the Kenedy Memorial Foundation, of which he was both a Member and Director. In 1962 an Apostolic Visitator had been appointed by the Holy See in an effort to settle this dispute.

I recall that in September 1963, Brother Leo told me that he had received orders from both the Apostolic Visitator and his Superior in Spencer, Massachusetts to sign a settlement relating to the law-suit. At the same time he was also ordered to sign a resignation as Member and Director of the Foundation.

Brother Leo discussed this situation with me at great length, asking my advice as to how he should respond to these orders from his Superiors. He told me that he was told that he would be dimissed from his Order if he failed to comply. I advised Brother to sign the settlement alone, but that instead of sending it back to the attorneys in New York as he had been instructed to do, to have it forwarded by hand to the Holy See along with a covering letter in which he would explain his position of conscience. Accordingly, Brother Leo drafted a several page letter addressed to the Holy See in which he set forth the reasons why in conscience he could not accept to the terms of the settlement. He showed me the final draft of the letter, which I read carefully. Then he signed both the settlement and the covering letter in my

presence and gave them to me. I placed them in an envelope, and sent them to the Holy See.

In the covering letter, Brother Leo explained that he had been ordered by his Superiors to execute a settlement and sign a resignation from Mrs. East's Foundation. He went on to say that the settlement was clearly contrary to Mrs. East's wishes, and that therefore he could not in conscience agree to it. However, in view of the fact that he had been ordered to sign this settlement by the Apostolic Visitator, he was doing so but was sending it along with the covering letter to the Holy See asking that the settlement not be released to the civil court in Texas *unless* the Holy See in writing, took the full responsibility to change the Will of Mrs. East. In other words, Brother Leo's signature on the settlement was to be regarded as being conditioned upon a subsequent act of the Holy See, provided the Holy See was willing to assume the responsibility to alter the clearly expressed wishes of Mrs. East. In thus way, Brother Leo felt that he was able to discharge his obligations both to the Apostolic Visitator and to his conscience.

Subscribed and sworn to before me
this 14th day of June, 1966.

/s/ José Aldunate Lyon
REV. JOSE ALDUNATE LYON

/s/ John B. Barbadoro, Jr.
Vice Consul of the United States
of America

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-81-CA-380

CHRISTOPHER GREGORY,

Plaintiff

v.

THOMAS J. DRURY, BRUNO R. GOLDAPP, ELENA S. KENEDY, LEE H. LYTTON, JR., KENNETH ODEN, MARK WHITE, Attorney General of the State of Texas, and THE ALICE NATIONAL BANK,

Defendants

AFFIDAVIT OF MARSHALL BOYKIN, III

I, Marshall Boykin, III hereby under oath depose and state:

1. I am a member of the Bar of the State of Texas and practice law with the firm of Wood, Boykin, Wolter, Smith and Hatridge, 2000 First City Bank Tower, Corpus Christi, Texas. I submit this affidavit in support of the plaintiff's opposition to the defendants' Motion for Judgment on the Pleadings and in support of the plaintiff's Motion for Preliminary Injunction.

2. In late 1964 I was the first retained to represent Christopher Gregory ["Gregory"], also known as Brother Leo, the plaintiff in this action, in connection with certain litigation in which he was a defendant in the Texas state courts. I continued to represent Gregory until early 1980.

3. I understand that the defendants in this lawsuit contend that a hearing before the District Court for the 79th Judicial District of Jim Wells County, Texas on September 21, 1979 was a "trial." That proceeding was not, however, a trial but was instead a hearing on certain motions.

4. Attached hereto and marked "A" through "D" are copies of the documents I received prior to the hearing which constitute the only notice I received regarding that hearing on behalf of Gregory. I initially learned on August 6, 1979 that the hearing was scheduled for August 10, 1979. The hearing was subsequently postponed first to August 31, 1979 and later to September 21, 1979. The notice I received was of a hearing on the defendants' Motion for Entry of Final Judgment and Motion to Dismiss Defendant Gregory's Motion to Set Aside Interlocutory Judgment. I had no notice of a trial and no notice that I should bring witnesses prepared for a trial.

5. On September 21, 1979 I appeared without witnesses to argue the merits of the defendants' motions. My client attended the hearing with me but was not prepared to testify. I objected on the record at the hearing on numerous occasions to the introduction of testimony and documentary evidence, on the grounds that I had no notice of a trial and therefore no opportunity to prepare for a trial.

/s/ (original signed)
MARSHALL BOYKIN, III

Dated: March 16, 1982

Signed and sworn to before me this, the 16th day of March, 1982.

/s/ (original signed)
Notary Public
My commission expires: 9-20-84

IN THE DISTRICT COURT OF
JIM WELLS COUNTY, TEXAS
79TH JUDICIAL DISTRICT

No. 12074

LEE H. LYTTON, JR.

vs.

THE JOHN G. and MARIE STELLA KENEDY
MEMORIAL FOUNDATION, *et al.*

ORDER

BE IT REMEMBERED that on the 24th day of July, 1979, came on to be heard the Honorable Mark White, Attorney General of the State of Texas, by law a necessary part to this litigation, and Thomas M. Dolye, John J. Meehan and J. Peter Grace, some of the Defendants in the above-styled and numbered cause, in their Motion for the Entry of Final Judgment and Motion to Dismiss Defendant Gregory's Motion to Set Aside Interlocutory Judgment, and it being the opinion of the Court that said Motions are meritorious, it is therefore,

ORDERED that said Motions be set for hearing on the 10th day of August, 1979, at 11 o'clock P.M.

SIGNED and ENTERED on this 24th day of July, 1979.

/s/ (original signed)
Judge Presiding

"A"

WESTERN UNION MAILGRAM

Middletown, Va. 22649

4-035697S218 08/06/79 ICS IPMBNGZCSP CP CA
7136690880 MGM TDBN HOUSTON TX
150 08-06 0112P EST

Francis Marshall Boykin III
2000 Corpus Christi Bank & Trust Tower
Corpus Christi TX 78477

This mailgram will confirm a letter of separate cover indicating resetting of hearing on joint motion of the Honorable Mark White, Attorney General for the State of Texas and the Sarita Kennedy East Foundation for the entry of final judgment in the cause entitled Lee H/ Lytton, Jr et al. versus The John G. and Marie Stella Kennedy Memorial Foundation et al. The hearing is set for August 31, 1979 at 11 AM and is to convene at the Jim Wells County Court House in Alice, Texas.

cc: Cahill Gordon & Rindel, Attn Dennis McInerney
80 Pine St New York NY 10005

cc: Ms Francie A. Frederick, Assistant Attorney General, State of Texas, Charitable Trust Section, State and County Divn Supreme Court Bldg
PO Box 12548 Austin Texas 78711
Larry Watts, co-counsel for defendant, Sarita Kennedy East Foundation

1317 EST

MGMCO MP MGM

"B"

WESTERN UNION MAILGRAM

Law Offices Larry Watts
2325 University
Houston TX 77005

4-065859S218 08/06/79 ICS IPMB NGZ CSP CPCB
7136690880 MGM TDB N HOUSTON TX
111 08-06 0457P EST

Francis Marshall Boykin III
2000 Corpus Christi Bank and Trust Tower
Corpus Christi TX 78477

This mailgram will confirm a letter of seperate cover indicating notice of hearing on joint motion of the Honorable Mark White, Attorney General for the State of Texas and the Sarita Kenedy East Foundation for the entry of final judgment in the cause entitled Lee H. Lytton, Jr at all. vs the John G. and Marie Stella Kenedy Memorial Foundation, at all. The hearing has been reset for September 21, 1979 at 11:00AM and is to convene at the Jim Wells County Courthouse in Alice Texas.

Larry Watts co-counsel for defendant Sarita Kenedy East Mem Foundation

1702 EST

MGMCOMP MGM

"C"

LAW OFFICES OF LARRY WATTS, P. C.
2325 University Blvd.
Houston, Texas 77005
713/669-0880

April 7, 1979

Homer Dean
P.O. Box 150
Alice, Texas 78332

Francis Marshall Boykin, III
2000 Corpus Christi Bank & Trust Tower
Corpus Christi, Texas 78477

Cahill, Gorden & Reindel
Attn: Denis McInery
Eighty Pine Street
New York, New York 10005

Re: Lee H. Lytton, Jr. vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al; Cause No. 12074

Gentlemen:

Enclosed please find copies of the Motion to Dismiss Defendant Gregory's Motion to Set Aside Interlocutory Judgment, Motion For the Entry of Final Judgment and Supporting Memorandum as filed by the Honorable Mark White, Attorney General of the State of Texas and Thomas M. Doyle, John J. Meehan, and J. Peter Grace as some of the several Defendants in the above styled and numbered cause.

Also please find a copy of the Order of July 24, 1979, setting a hearing on the aforementioned Motions. This will serve as official notice that said hearing has been re-set for September 21, 1979, at 11:00 a.m. at the

County Courthouse for Jim Wells County. Thank you for your attention to this matter.

Sincerely,

/s/ Harris Butler
HARRIS BUTLER
Law Clerk for
Larry Watts

encl.

cc: District Clerk for Jim Wells County
Alice, Texas 78332

Alice National Bank, Independent
Executor for Estate of Sarita K.
East, Deceased
P.O. Drawer 1790
Alice, Texas 78332

The John G. & Marie Stella Kenedy
Memorial Foundation
P.O. Drawer 331
Alice, Texas 78332

Mr. Kenneth Oden, Jr.
P.O. Drawer 331
Alice, Texas 78332

Mr. B.R. Goldapp
Alice National Bank
P.O. Drawer 1790
Alice, Texas 78332

The Attorney General for the
State of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711

Mr. Lee H. Lytton, Jr.
Sarita, Texas 78385

Most Reverend Thomas J. Drury
Bishop of the Diocese of
Corpus Christi
620 Lipan Street
Corpus Christi, Texas 78401

Mrs. Elena Kenedy
Sarita, Texas 78385

Denman Moody
P.O. Box 2558
Houston, Texas 77001

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-81-CA-380

CHRISTOPHER GREGORY,
Plaintiff

v.

THOMAS J. DRURY, BRUNO R. GOLDAPP, ELENA S. KENEDY, LEE H. LYTTON, JR., KENNETH ODEN, MARK WHITE, Attorney General of the State of Texas, and THE ALICE NATIONAL BANK,
Defendants

AFFIDAVIT OF WILLIAM R. JOYCE, JR.

I, William R. Joyce, hereby under oath depose and state:

1. I am a member in good standing of the Bars of the State of New York and the District of Columbia, and am engaged in the practice of law in Washington, D.C. I submit this affidavit in support of the plaintiffs' opposition to the defendants' Motion for Judgment on the Pleadings and in support of the plaintiff's Motion for Preliminary Injunction.

2. In approximately November, 1961 I was first retained to represent Christopher Gregory, the plaintiff in this lawsuit, who is also known by the religious name Brother Leo. At that time, he was a defendant in a lawsuit in the Texas state courts in which it was alleged that he exercised undue influence over Sarita Kenedy

East in bringing about his appointment as sole member of the John G. and Marie Stella Kenedy Memorial Foundation, of which Mrs. East was founder. I continued to represent Mr. Gregory until approximately late 1964 or early 1965 in connection with that litigation, at which time Marshall Boykin, III took over as Mr. Gregory's lawyer.

3. During the years 1961 through 1964, I had numerous occasions to discuss the course of the Texas litigation and my client's position in that litigation with other attorneys involved. I specifically recall numerous conversations and correspondence with Kenneth Oden, a defendant in this lawsuit, and his partner Jacob Floyd (who is now deceased), and several conversations with Denman Moody and Robert Jewett, both of the firm of Baker and Botts in Houston, Texas. All of these lawyers were well aware that I represented Brother Leo in connection with the Texas litigation during that time period.

4. During the summer of 1964, I had several conversations and correspondence with Mr. Oden in which I asked him about the status of the Texas litigation. At no time did Mr. Oden inform me that a hearing has been scheduled for September 1, 1964. In fact, I had written to Mr. Oden on August 31, 1964, to which he responded on September 3, 1964, without any mention of the September 1, 1964 hearing, despite the fact that he knew I represented Mr. Gregory. A copy of Mr. Oden's response to me from my files is attached hereto and marked "A".

5. I learned only through a report in *The New York Times* that the September 1, 1964 hearing had been held and that a purported settlement agreement had been filed with the Texas court. I subsequently discovered that Robert Jewett had purported to act on behalf of my client, Mr. Gregory, at that hearing and in tendering Mr. Gregory's resignation from the Foundation. A copy of the minutes of a special meeting of the Foundation, held on September 1, 1964 for the purpose of accepting the

purported settlement agreement and Mr. Gregory's purported resignation from the Foundation is attached hereto and marked "B".

6. The minutes attached as exhibit "B" show that Mr. Jewett purported to represent Mr. Gregory at the meeting, and that Mr. Oden accepted Mr. Jewett's actions as secretary of the Foundation. The minutes also show that Mr. Jewett purported to tender Mr. Gregory's resignation from the Foundation at that time, which Mr. Oden accepted as secretary of the Foundation. I was shocked to learn of these actions since both Mr. Jewett and Mr. Oden had to have known that I represented Mr. Gregory. In addition, I am certain that they knew that Mr. Gregory had revoked the only resignation from the Foundation he had ever signed, because I sent Mr. Oden's partner a copy of that revocation myself. Attached hereto and marked "C" is a copy of my letter to Mr. Floyd and the enclosed resignation.

7. I thereafter attempted to remedy the misrepresentations made on September 1, 1964, and initially wrote to Mr. Oden on December 9, 1964 and then to Lawrence McKay, the New York counsel who had retained Baker and Botts as their local counsel, on December 11, 1964. Copies of those letters are attached and marked "D" and "E". Mr. McKay indicated to me in no uncertain terms that he intended to do nothing regarding the impropriety of the September 1, 1964 hearing. A copy of his response to me is attached and marked "F".

/s/ (Original signed)
WILLIAM R. JOYCE, JR.

Dated:

Signed and sworn to before me this, the 19th day of March, 1982.

Notary Public

My commission expires:

Law Offices
PERKINS, FLOYD, DAVIS & ODEN
P.O. Drawer 331
Alice, Texas
Code No. 78332

September 3, 1964

Mr. William R. Joyce, Jr.
Curtis, Mallet-Prevost, Colt & Mosle
Federal Bar Building
1815 H Street, N.W.
Washington, D.C.

Dear Mr. Joyce:

Many thanks for your letter of August 31st, 1964.

I will communicate with you at an early date regarding the matters raised therein.

Yours very truly

PERKINS, FLOYD, DAVIS & ODEN

/s/ Kenneth Oden
KENNETH ODEN

KO/ml

cc: Mr. William R. Joyce, Jr.
63 Wall Street
New York, New York 10005

AIR MAIL

"A"

MINUTES OF SPECIAL MEETING OF THE MEMBERS OF THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

A meeting of the members of The John G. and Marie Stella Kenedy Memorial Foundation was held in the Jim Wells County Courthouse at Alice, Texas, on September 1st, 1964, at 2:30 o'clock P.M.

Present at the meeting were:

Most Reverend M.S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi

Elena S. Kenedy

Lee H. Lytton, Jr.

B.R. Goldapp

Kenneth Oden

Robert K. Jewett, as proxy and attorney in fact for J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo, O.C.S.O.

Kenneth Oden acted as Secretary of the meeting. A waiver of notice of the meeting executed by all of those present was delivered to the Secretary for filing with the minutes of the meeting.

The Secretary then tendered to the meeting a copy of a form of judgment, executed on behalf of all of the parties present at the meeting, and such form of judgment and its Exhibits was directed to be annexed to the minutes of this meeting as Exhibit A and placed in the minute book of the corporation.

The Secretary announced to the meeting that there had been heretofore filed with the Foundation the resignations of the following named persons in all capacities or offices which each, respectively, have at any time held or claimed in the Foundation, to-wit:

Reverend Patrick J. Peyton, C.S.C.

Henrietta K. Armstrong

Lawrence E. Wood

T.M. Doyle

John J. Meehan

Mr. Oden then stated that Messrs. Lee H. Lytton, Jr. and Jacob S. Floyd, through their execution of the form of the judgment presented to the meeting, had ratified their resignations dated June 13, 1960, as members of the Foundation. Mr. Oden advised that Mr. Floyd died on February 27, 1964, following his execution of the form of the judgment presented to the meeting. The Secretary was then directed by all persons present at the meeting to express to Mr. Floyd's family the appreciation of those present for the services rendered by Mr. Floyd on behalf of the Foundation and to convey to the members of his family the sympathy of those present.

Mr. Lee H. Lytton, Jr., then delivered to the Secretary of the meeting his resignation as a member of the Foundation.

J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo, O.C.S.O., acting through their proxy and attorney in fact, Robert K. Jewett, then voted to elect as members of the Foundation the following persons:

Most Reverend M.S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi

Elena S. Kenedy

Lee H. Lytton, Jr.

B.R. Goldapp

Kenneth Oden

Christopher Gregory, sometimes known as Brother Leo, O.C.S.O., and J. Peter Grace, acting through their said proxy and attorney in fact, Robert K. Jewitt, and acting in conformity with the provisions of the form of the judgment presented to the meeting, tendered to the Foundation their respective resignations as members of the Foundation, which said resignations were accepted by the Secretary and the members of the Foundation present at the meeting, and were filed and directed to be retained in the corporate records of the Foundation.

The meeting then proceeded to the selection of a Chairman of the meeting, and Mrs. Elena S. Kenedy was selected and thereafter acted as Chairman of the meeting.

The Chairman stated that at the present time there were no directors of the Foundation, and that directors of the Foundation should be elected; whereupon, the following persons were duly elected as directors of the Foundation, to serve until the next annual meeting of the Foundation and thereafter until their successors shall have been elected and shall have qualified:

Most Reverend M.S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi

Elena S. Kenedy

Lee H. Lytton, Jr.

B.R. Goldapp

Kenneth Oden

The Chairman then stated that attention should be given to the amendment of the Articles of Incorporation of the Foundation and presented to the meeting and asked the Secretary to mark for identification and file with the corporate records of the Foundation, a proposed form of such amendment to such Articles.

After a discussion of such proposed amendment to the Articles of Incorporation of the Foundation, the follow-

ing resolutions were duly offered and unanimously adopted:

RESOLVED: That the Articles of Incorporation of the Foundation be amended by adding thereto a new Article IX and a new Article X, reading as follows:

ARTICLE IX

(a) The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

(i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;

(ii) at least two other practical Catholics;

(iii) at least two members who shall be non-Catholic.

(b) At no time shall the membership be less than sixty percent (60%) Catholic, the said sixty percent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent (33⅓%) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

(c) This Article IX of the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

ARTICLE X

(a) The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

(b) All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

(c) This Article X of the Articles of Incorporation of the John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

RESOLVED: That the proper officers of this corporation are hereby authorized and directed to amend the Articles of Incorporation of this Foundation in the manner hereinabove set forth, and to file such amendment with the Secretary of State of the State of Texas, and to do and perform all such things as may be necessary and requisite to make such amendments to the Articles of Incorporation of this Foundation fully effective.

The Chairman then stated that the By-laws of the Foundation should be amended in certain respects, and submitted such proposed amendments to the By-laws of the Foundation to the meeting for consideration. After discussion of such proposed amendments to the By-laws, the following resolutions were duly offered and unanimously adopted:

RESOLVED: That Article III of the By-Laws of the Foundation is hereby amended to insert the following as paragraphs 1a, 1b and 1c thereof, to-wit:

1a. The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

(i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;

(ii) at least two other practical Catholics;

(iii) at least two members who shall be non-Catholic.

1b. At no time shall the membership be less than sixty percent (60%) Catholic, the said sixty per-

cent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent (33⅓%) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

1c. Paragraphs 1a and 1b above of this Article III of the By-laws of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable;

and paragraph 2 thereof is amended to insert at the beginning thereof the words "Subject to the foregoing provisions of paragraphs 1a, 1b and 1c hereof,".

RESOLVED: That there shall be added to the By-laws of the Foundation a new Article XI, reading as follows:

ARTICLE XI

1. The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

2. All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

3. This Article XI of the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable;

and the present Article XI of the By-Laws shall be renumbered Article XII.

The Chairman then referred to the form of the judgment earlier presented to this meeting, and also presented to the meeting and referred to a certain order

dated January —, 1964, entered in Cause No. 85, District Court of Kenedy County, Texas, styled Arnold R. Garcia, Temporary Administrator of the Estate of Sarita Kenedy East, Deceased, vs. The John G. and Marie Stella Kenedy Memorial Foundation. She advised that such form of judgment provided for the conveyance by the Foundation to the Sarita Kenedy East Foundation, Inc., a non-profit charitable corporation organized and existing under the laws of the State of New York, of a production payment out of certain properties of the Foundation in the form of the assignment annexed as Exhibit C to such form of judgment. After consideration of the form of such assignment and such order, the following resolution was duly offered and unanimously adopted:

RESOLVED: That, subject to that certain order dated January —, 1964, in Cause No. 85, District Court to Kenedy County, Texas, styled Arnold R. Garcia, Temporary Administrator of the Estate of Sarita Kenedy East, Deceased, vs. The John G. and Marie Stella Kenedy Memorial Foundation, the assignment by this Foundation to the Sarita Kenedy East Foundation, Inc., a New York non-profit corporation, of the production payment set forth in the form of conveyance attached as Exhibit C to the form of judgment presented to this meeting is hereby approved, and, upon the dissolution of such order the directors of this Foundation are hereby directed to authorize the execution and delivery of such conyevance.

There being no further business to come before the meeting, it was duly adjourned.

/s/ Kenneth Oden
Secretary

APPROVED:

/s/ Elena S. Kenedy
Chairman

September 19, 1963

Washington, D.C. 20005

Mr. Jacob S. Floyd, Secretary
Kenedy Memorial Foundation
Alice National Bank Building
Alice, Texas

Dear Sir:

I am enclosing herewith the document I referred to in my telegram to you of September 7, 1963, namely the revocation of resignation by Brother M. Leo, O.C.S.O., also known as Christopher Gregory, as Member of the Kenedy Memorial Foundation.

Very truly yours

WILLIAM R. JOYCE, JR.

Enclosure
WRJ/cs

cc:
Major Tom [Illegible]
Clerk, District of [Illegible]

"C"

SAVE THIS RECEIPT. Present it when making inquiry or claim.

Claim must be filed within 1 year from the date of mailing.

Consult postmaster as to fee chargeable on registered parcel post packages addressed to foreign countries.

U.S. GOVERNMENT PRINTING OFFICE 048-16-70493-4

September 12, 1963.

I hereby revoke the Resignation that I signed during 1962, as Member of THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION. This Resignation was never filed with the Foundation in Alice, Texas, and as a consequence is not effective. By this action signed to-day it is revoked and becomes void.

Signed:

/s/ Christopher Gregory

REPUBLIC OF CHILE
PROVINCE AND CITY OF SANTIAGO
EMBASSY OF THE UNITED STATES OF AMERICA

Subscribed and sworn to before me this 12th day of September, 1963.

/s/ Oscar R. Edmondson
OSCAR R. EDMONDSON
Vice Consul of the
United States of America

December 9, 1964

Kenneth Oden, Esq.
Perkins, Floyd, Davis & Oden
P.O. Drawer 331
Alice, Texas 78332

Dear Mr. Oden:

I have reviewed the copy of the judgment in *Lytton* v. *Kenedy Memorial Foundation, et al* which you sent me. After careful study of same, I find it necessary to bring to your attention the enclosed copies of two documents which I feel quite strongly should be called to the Court's attention. In view of the terms of the settlement and the fact that my client left these documents with me and is incommunicado, I have a professional obligation to see that the Court is advised that Brother Leo did not freely agree to the terms of the settlement and that he was not represented by counsel of his own choice in connection therewith. I would appreciate, therefore, hearing from you as soon as possible on this matter.

Very truly yours,

WILLIAM R. JOYCE, JR.

Enc: 2

WRJ:lkk

"D"

December 11, 1964

Lawrence J. McKay, Esq.
Messrs. Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, N.Y.

Dear Sir:

I am enclosing herewith a copy of a letter and its enclosures that I wrote on December 9, 1964 to Mr. Kenneth Oden in Alice, Texas in connection with the *Lytton* v. *Kenedy Memorial Foundation* case. In view of the representations made in the settlement submitted to the Court in Texas and the statements contained in the enclosures accompanying my letter to Mr. Oden, I would appreciate hearing from you as soon as possible on this matter.

Very truly yours,

WILLIAM R. JOYCE, JR.

Enclosures

WRJ:lkk

"E"

CAHILL, GORDON, REINDEL & OHL
Eighty Pine Street
New York, N.Y.

Telephone WHitehall 4-7400

December 21, 1964

Dear Sir:

I acknowledge receipt of your letter of December 11, 1964 together with the enclosures referred to therein.

I note that you "feel quite strongly" that the two documents you refer to purportedly signed by Bro. M. Leo in one instance and by Christopher Gregory in the other, should be called to the Court's attention. I further note that you feel that you have ". . . a professional obligation to see that the Court is advised that Brother Leo did not freely agree to the terms of the settlement and that he was not represented by counsel of his own choice in connection therewith."

The reason you would appreciate hearing from me escapes me. I assume that you will implement your strong feeling and fulfill what you regard as your professional obligation.

Yours very truly,

/s/ Lawrence J. McKay
LAWRENCE J. MCKAY

William R. Joyce, Jr., Esq.
Curtis, Mallet-Prevost, Colt & Mosle
Federal Bar Building
1815 H Street, N.W.
Washington, D.C. 20006

"F"

APPENDIX K

The Fifth Amendment to the United States Constitution provides in relevant part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

The Fourteenth Amendment to the United States Constitution, Section 1, provides in part that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

APPENDIX L

42 U.S.C. § 1983 provides in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1738 provides in relevant part that:

> The Acts of the legislature of any State, Territory, or Possession of the United States . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

APPENDIX M

Tex. R. Civ. P. 216 provides in relevant part that:

> No jury trial shall be had in any civil suit, unless application be made therefor . . . on or before the appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance.